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07/20/2006 10:04 AM

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Subject Voter ID Brief

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RECOMMENDATIONS

Because every provisional ballot counted represents a voter who, if the system had worked perfectly, should have voted by regular ballot, the advent of statewide registration databases is likely to reduce the use of provisional ballots. The one area in which such databases may not make a difference is for those who voted by provisional ballot because they did not bring required identification documents to the polling place. The statewide voter registration database will facilitate verifying that ballot, but the voter will still have to vote provisionally. Beyond that exception, even with statewide registries in every state, provisional voting will remain an important failsafe, and voters should have confidence that the failsafe will operate correctly.

The wide variation in the implementation of provisional voting among and particularly within states suggests that EAC can help states strengthen their processes. Research-based recommendations for best, or at least better, practices based on the experience gained in the 2004 election can be useful in states' efforts to achieve greater consistency in the administration of provisional voting.

Self-evaluation of Provisional Voting –4 Key Questions

The first step to achieving greater consistency within each state is to think about provisional voting systematically. As legislators, election officials, and citizens in the states prepare for the 2006 election, they should ask themselves these questions about their provisional voting systems.

1. Does the provisional voting system distribute, collect, record, and tally provisional ballots with sufficient accuracy to be seen as procedurally legitimate by both supporters and opponents of the winning candidate? Does the tally include all votes cast by properly registered voters who correctly completed the steps required?
2. Is the provisional voting system sufficiently robust to perform well under the pressure of a close election when ballot evaluation will be under scrutiny and litigation looms?
3. Do the procedural requirements of the system permit cost-efficient operation? Are the administrative demands of the system reasonably related to the staff and other resource requirements available?
4. How great is the variation in the use of provisional voting in counties or equivalent levels of voting jurisdiction within the state? Is the variation great enough to cause concern that the system may not be administered uniformly across the state?

If the answers to these questions leave room for doubt about the effectiveness of the system or some of its parts, the EAC's recommendation of best practices should provide the starting point for a state's effort to improve its provisional voting system.

SUMMARY OF RECOMMENDATIONS FOR BEST PRACTICES

State efforts to improve the provisional voting process have been underway since the 2004 election. By recommending best practices, the EAC will offer informed advice while respecting diversity among the states.

Take a quality-improvement approach

Defining what constitutes a successful provisional voting system is difficult. Defining quality requires a broad perspective about how well the system works, how open it is to error recognition and correction, and how well provisional voting processes are connected to the registration and voter identification regimes. A first step is for states to recognize that improving quality begins with seeing the provisional voting process as a system and taking a systems approach to regular evaluation through standardized metrics with explicit goals for performance. EAC can facilitate action by the states by recommending as a best practice that:

- Each state collect data systematically on the provisional voting process to permit evaluation of its voting system and assess changes from one election to the next. The data collected should include: provisional votes cast and counted by county; reasons why provisional ballots were not counted; measures of variance among jurisdictions, and time required to evaluate ballots by jurisdiction

Emphasize the importance of clarity

Above all else, the EAC should emphasize the importance of clarity in the rules by which each state governs provisional voting. As state legislators and election officials prepare for the 2006 election, answers to the questions listed in the recommendations section of this report could be helpful. Among those questions are:

- Does the provisional voting system distribute, collect, record, and tally provisional ballots with sufficient accuracy to be seen as procedurally legitimate by both supporters and opponents of the winning candidate?
- Do the procedural requirements of the system permit cost-efficient operation?
- How great is the variation in the use of provisional voting in counties or equivalent levels of voting jurisdiction within the state? Is the variation great enough to cause concern that the system may not be administered uniformly across the state?

Court decisions suggest areas for action

The court decisions following the 2004 election also suggest procedures for states to incorporate into their procedures for provisional voting. EAC should recommend to the states that they:

- Promulgate clear standards for evaluating provisional ballots, and provide training for the officials who will apply those standards.
- Provide effective materials to be used by local jurisdictions in training poll workers on such procedures as how to locate polling places for potential voters who show up at the wrong place.
- Make clear that the only permissible requirement to obtain a provisional ballot is an affirmation that the voter is registered in the jurisdiction and eligible to vote in an election for federal office. Poll workers need appropriate training to understand their duty to give such voters a provisional ballot.

Assess each state of the provisional voting process

Beyond the procedures suggested by court decisions, states should assess each stage of the provisional voting process. They can begin by assessing the utility and clarity of the information for voters on their websites and by considering what information might be added to sample ballots mailed to voters before elections. The better voters understand their rights and obligations, the easier the system will be to manage, and the more legitimate the appearance of the process.

Avoiding error at the polling place will allow more voters to cast a regular ballot and all others who request it to cast a provisional ballot. Our recommendations for best practices to avoid error at the polling place include:

- The layout and staffing of the multi-precinct polling place is important. States should ensure that training materials distributed to every jurisdiction make poll workers familiar with the options available to voters.
- The provisional ballot should be of a design or color sufficiently different from a regular ballot to avoid confusion over counting and include take-away information for the voter on the steps in the ballot evaluation process.
- Because provisional ballots offer a fail-safe, supplies of the ballots at each polling place should be sufficient for all the potential voters likely to need them. Best practice for states should provide guidelines (as do Connecticut and Delaware) to estimate the supply of provisional ballots needed at each polling place.

The clarity of criteria for evaluating voter eligibility is critical to a sound process for deciding which of the cast provisional ballots should be counted.

- State statutes or regulations should define a reasonable period for voters who lack the HAVA-specified ID or other information bearing on their eligibility to provide it in order to facilitate the state's ability to verify that the person casting the provisional ballot is the same one who registered. At least 11 states allow voters to provide ID or other information one to 13 days after voting. Kansas allows voters to proffer their ID by electronic means or by mail, as well as in person.
- More provisional voters have their ballots counted in those states that count ballots cast outside the correct precinct. While HAVA arguably leaves this decision up to the states, pointing out the effect of the narrower definition on the portion of ballots counted could be useful to the states in deciding this question. States should be aware, however, of the additional burden placed on the ballot-evaluation process when out-of-precinct ballots are considered. And tradeoffs are involved if out-of-precinct voters are unable to vote for the local offices that might appear on the ballot in their district of residence.
- If a state does require voters to appear at their assigned precinct, where the same polling site serves more

than one precinct, a voter's provisional ballot should count so long as the voter cast that ballot at the correct polling site even if at the wrong precinct within that location. While the best practice might be for poll workers to direct the voter to correct precinct poll workers' advice is not always correct, and the voter should be protect against ministerial error.

- Officials should follow a written procedure, and perhaps a checklist, to identify the reason why a provisional ballot is rejected. Colorado's election rules offer particularly clear guidance to the official evaluating a provisional ballot.

In verifying provisional ballots, the time by which election officials must make their eligibility determinations is particularly important in presidential elections because of the need to certify electors to the Electoral College. Our research did not identify an optimum division of the five weeks available.

- The best practice here is for states to consider the issue and make a careful decision about how to complete all steps in the evaluation of ballots and challenges to those determinations within the five weeks available.

After the election, timely information to voters about the disposition of their provisional ballot can enable voters to determine if they are registered for future elections and, if not, what they need to do to become registered.

- Best practice for the states is to establish mechanisms to ensure that voters casting provisional ballots are informed whether they are now registered for future elections and, if not, what they need to do to become registered.

Final observation

The detailed examination of each stage in the provisional voting process can lay the foundation each state needs to improve its system. Efforts to improve provisional voting may be most effective as part of a broader effort by state and local election officials to strengthen their systems. Collecting and analyzing data about those systems will enable states to identify which aspects of the registration and electoral system are most important in shunting voters into the provisional ballot process. Responsible officials can then look to their registration system, identification requirements or poll worker training as ways to reduce the need for voters to cast their ballots provisionally.

Best Practices For Each Step In The Process

We examined each step of the provisional voting process to identify specific areas where the states should focus their attention to reduce the inconsistencies noted in our analysis. We offer recommendations in each area appropriate to the responsibilities that HAVA assigns the EAC for the proper functioning of the provisional voting process.

The Importance of Clarity

The EAC should emphasize above all else the importance of clarity in the rules governing every stage of provisional voting. As the Century Foundation's recent report observed, "Close elections increasingly may be settled in part by the evaluating and counting of provisional ballots. . . . To avoid post election disputes over provisional ballots—disputes that will diminish public confidence in the accuracy and legitimacy of the result—well in advance of the election, states should establish, announce, and publicize clear statewide standards for every aspect of the provisional ballot process, from who is entitled to receive a provisional ballot to which ones are counted."²⁶

Litigation surrounding the 2004 election resulted in decisions that, if reflected in state statutes or regulations and disseminated in effective training for poll workers, can increase the clarity of provisional ballot procedures, increase predictability, and bolster confidence in the system. By taking the following steps, states can incorporate those court rulings into their procedures.

- Promulgate, ideally by legislation, clear standards for evaluating provisional ballots, and provide training for the officials who will apply those standards. For example, in Washington State, the court determined that an election official's failure in evaluating ballots to do a complete check against all signature records is an error serious enough to warrant re-canvassing.²⁷ Clear direction by regulation or statute on what records to use in evaluating ballots could have saved precious time and effort and increased the reliability of the provisional voting system.
- States should provide standard information resources for the training of poll workers by local jurisdictions. Training materials might include, for example, maps or databases with instruction on how to locate polling places for potential voters who show up at the wrong place. Usable and useful information in the hands of poll workers can protect voters from being penalized by ministerial errors at the polling place.²⁸
- State training materials provided to local jurisdictions should make clear that the only permissible requirement to obtain a provisional ballot is an affirmation that the voter is registered in the jurisdiction and eligible to vote in an election for federal office.²⁹ Recent legislation in Arizona indicates that recommendations should emphasize HAVA's requirement that persons appearing at the polling place claiming to be registered voters cannot be denied a ballot because they do not have identification with them. Poll

²⁶ The Century Foundation, *Balancing Access and Integrity, Report of the Working Group on State Implementation of Election Reforms*, July 2005.

²⁷ See *Washington State Republican Party v. King County Division of Records*, 103 P3d 725, 727-728 (Wash. 2004).

²⁸ See *Panio v. Sunderland* 824 N.E.2d 488, 490 (NY, 2005) See also Order, *Hawkins v. Blunt*, No.04-4177-CV-C-RED (W.D. Mo. October 12, 2004). While rejecting the notion that all ballots cast in the wrong precinct should be counted, the court ruled that provisional votes cast in the wrong precinct should be thrown out provided that the voter had been directed to the correct precinct. This meant that provisional votes cast in the wrong precinct (and even the wrong polling place) would count if there were no evidence that the voter had been directed to a different polling place. The court placed a duty upon election officials to make sure the voters were in the correct locations. Note that this question would not arise in a state that counted ballots cast in the wrong polling place but within the correct county.

²⁹ *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 774 (6th Cir. 2004)

workers may need appropriate training to understand their duty to give such voters a provisional ballot.³⁰

A. Registration and Pre-Election Information for Voters

Providing crisp, clear information to voters before the election is important to the success of the provisional voting process. The better voters understand their rights and obligations, the easier the system will be to manage, and the more legitimate the appearance of the process. States can begin by assessing the utility and clarity of the information for voters on their websites and by considering what information might be added to sample ballots mailed to voters before elections. Best practices in this area would include:

1. If states require identification at the time of registration, the kind of IDs required should be stated precisely and clearly and be publicly and widely available in a form that all voters can understand. For example, "You must bring your driver's license. If you don't have a driver's license, then you must bring an ID card with your photograph on it and this ID card must be issued by a government agency."³¹
2. The process to re-enfranchise felons should be clear and straightforward. To avoid litigation over the registration status of felons, best practice should be defined as making re-enfranchisement automatic, or no more burdensome than the process required for any new registrant.³²
3. State or county websites for voters should offer full, clear information on boundaries of precincts, location of polling places, requirements for identification, and other necessary guidance that will facilitate registration and the casting of a regular ballot. An 800 number should also be provided. Models are available: the statewide databases in Florida and Michigan provide voters with provisional voting information, registration verification and precinct location information.

B. At the Polling Place

Avoiding error at the polling place will allow more voters to cast a regular ballot and all others who request it to cast a provisional ballot.

1. The layout and staffing of the polling place, particularly the multi-precinct polling place is important. Greeters, maps, and prominently posted voter information about provisional ballots, ID requirements, and related topics can help the potential voters cast their ballot in the right place. States should require poll workers to be familiar with the options and provide the resources needed for them to achieve the knowledge needed to be helpful and effective. Colorado has clear regulations on polling place requirements, including HAVA information and voting demonstration display.³³ Many states require training of poll workers. In some states that requirement is recent: after the 2004 election, New Mexico adopted a requirement for poll workers to attend an "election school."³⁴ A state

³⁰ *The Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1075-76 (N.D. Fla. 2004). The court explained that provisional voting is designed to correct the situation that occurs when election officials do not have perfect knowledge and when they make incorrect determinations about eligibility (the "fail-safe" notion). Denying voters provisional ballots because of on-the-spot determinations directly contradicts this idea. Even before the cited decision, the Florida Secretary of State's office had determined that any voter who makes the declaration required by federal law is entitled to vote a provisional ballot, even if the voter is in the wrong precinct.

³¹ Websites in 29 states describe, with varying degrees of specificity, the identification voters may need. In 18 states voters can learn something about the precinct in which they should vote. And in 6 states (California, District of Columbia, Kentucky, Michigan, North Carolina, and South Carolina) they can verify their registration on the website.

³² The Century Foundation, op. cit.

³³ 8 Colo. Code Regs. § 1505-1, Rule 7.1.

³⁴ 2005 N.M. Laws 270 page no. 4-5.

statutory requirement for training could facilitate uniform instruction of poll workers in those states that do not already provide it.

2. The provisional ballot should be of a design or color sufficiently different from a regular ballot to avoid confusion over counting, as occurred in Washington State. The ballot might include a tear-off leaflet with information for voters such as: "Reasons Why Your Provisional Ballot Might Not Be Counted" on one side and "What to Do if My Provisional Ballot Is Not Counted" on the other.
3. Because provisional ballots offer a fail-safe, supplies of the ballots at each polling place should be sufficient for all the potential voters likely to need them. In 2004, some polling places ran out of ballots, with unknown effects on the opportunity to vote. In Middlesex County, New Jersey, for example, on Election Day the Superior Court ordered the county clerk to assure that sufficient provisional ballots were available at several heavily used polling places, and it authorized the clerk "in the event additional provisional ballots are required . . . to photocopy official provisional ballots."³⁵ At least two states, Connecticut and Delaware, provide guidelines to local election officials on how to estimate the demand for provisional ballots. Connecticut sets the number at 1% of the voters in the district, Delaware at 6%.³⁶ States that do not offer a practical method to guide the supply of provisional ballots at polling places should consider doing so. The guideline should take into account both the number of voters in the district and the number of provisional ballots actually cast in recent elections.
4. To achieve the procedural clarity needed to forestall disputes, states should establish a clear chain of custody for the handling of provisional ballots from production through distribution, collection and, finally, evaluation. A number of states have clear procedures for at least parts of this chain of custody. All states should examine their chain-of-custody requirements for clarity. Illinois includes the potentially beneficial requirement that ballots be transported by bi-partisan teams, which offers the potential to avoid some charges of election fraud.

C. Evaluating Voter Eligibility and Counting Provisional Ballots

The clarity of criteria for evaluating voter eligibility is critical to a sound process for deciding which of the cast provisional ballots should be counted. Public recognition of the validity of those criteria is important to establishing the legitimacy of the system as a whole. The experience in 2004 in North Carolina, Washington, and Ohio underlines the importance of clear criteria. As the Century Foundation report put it, "Whatever procedures the states choose [to determine if a provisional ballot should be counted], the paramount consideration—as with all others concerning provisional voting—is that they be clear and thus not susceptible to post-election manipulation and litigation."³⁷ Nonetheless, the *Panio v. Sutherland*³⁸ decision in New York shows the difficulty of defining the range of administrative errors from which the provisional voters should be held harmless. Even when the standard is "clerical error" judges can differ over what that means exactly. Possibly a state law might be able to clarify a definition by giving examples of clerical errors, but even then the definition is unlikely to be perfect.

³⁵ Voting Order, November 2, 2004, Superior Court of New Jersey, Law Division, Middlesex County.

³⁶ Connecticut: "Equal to or not less than 1% of the number of electors who are eligible to vote in any given district, or such other number as the municipal clerk and the registrars agree is sufficient to protect voting rights." Conn. Gen. Stat. Ann. § 9-232j. Delaware: Each County Department of Elections Office is required to provide to each election district a number of provisional ballots equal to 6% of registered voters in that district, with a minimum allocation of 15 ballots. Additional supplies to be delivered when the supply becomes "very low." Del. Code Ann. Tit 15 § 4948(e).

³⁷ The Century Foundation, op. cit.

³⁸ 4 N.Y.3d 123, 824 N.E.2d 488 (N.Y. 2005) and Memorandum (LaPlante—Foley) Provisional Ballot Cases by State, July 19, 2005.

1. State statutes or regulations should define a reasonable period for voters who lack the HAVA-specified ID or other information bearing on their eligibility to provide it in order to facilitate the state's ability to verify that the person casting the provisional ballot is the same one who registered. While there may be a concern to ensure that the individual who returns with the ID may not be the same individual who cast the provisional ballot, the spirit of HAVA demands that the opportunity to prove identity be provided after Election Day. A signature match can go far in establishing that the individual who voted and the individual returning later with identification is, in fact, the same person. Encouraging a voter who lacks ID on Election Day to return later to help the verification process by providing proper identification will strengthen the system and increase public confidence in the electoral process. Our data indicate that some voters would prefer to return with ID rather than to sign an affidavit, perhaps because of uncertainty about the legal process involved in the affidavit. At least 11 states allow voters to provide ID or other information one to 13 days after voting. Of particular interest is Kansas, which allows voters to proffer their ID by electronic means or by mail, as well as in person.³⁹
2. More provisional ballots are counted in those states that verify ballots cast outside the correct precinct.⁴⁰ While HAVA arguably leaves this decision up to the states, pointing out the effect of the narrower definition on the portion of ballots counted could be useful to the states in deciding this question. States should be aware, however, of the additional burden placed on the ballot-evaluation process when out-of-precinct ballots are considered. And tradeoffs are involved if out-of-precinct voters are unable to vote for the local offices that might appear on the ballot in their district of residence. One option for states is to involve the voters in the decision by pointing out that voters who cast their provisional ballots in the wrong precinct may not be able to participate in the local election. The voter could then decide to go to the correct precinct or vote provisionally for the higher offices at the top of the ticket only.
3. Alternatively, if a state chooses to require voters to appear at their assigned precinct, where the same polling site serves more than one precinct, a voter's provisional ballot should count so long as the voter cast that ballot at the correct polling site even if at the wrong precinct within that location.⁴¹ Ideally the voter could be directed to the correct machine, but poll worker advice will not always be correct. One way to assess the balance of issues here is to consider that, if a voter in a multi-precinct polling place is sent to the wrong machine, the error is probably the poll worker's, and the voter should not be penalized.

³⁹ In Kansas, the voter can provide ID to a County Election Officer any time before the County Board of Canvassers meets to count provisional ballots. KS. ST. 25-1122(d). ID can be presented in person, OR via mail or electronic means. *Id.* The Board must meet either on the Friday or Monday following a Tuesday election. *Id.* at 25-3104. Deadlines in other states are: Alabama -- 5:00 P.M. on the Monday following the election AL ST § 17-10A-2(c); (1) Florida: until 5:00 P.M. on the third day following the election. Fla. Stat. Ann. § 101.048 (adopted after the 2004 election); Georgia—no later than 2 days after the election. GA ST § 21-2-417; 419. Illinois- 2 days to submit additional information 10 Ill. Comp. Stat. Ann. 5/18A-15(d); Indiana— in 2004 the deadline was the close of the polls IN. ST. §. 3-11.7-5-2(a). The time period was extended to 13 days by the adoption of Indiana Code 3-11-8, Section 25, Subsection (I); Maryland—until the meeting of the Election Board; MD ELEC LAW § 11-303. New Jersey— until the close of business on the second day after the election 19:53C-3(i). Nevada— until 5:00 P.M. on the Friday following the election NV ST 293.3085; New Mexico—until 7:00 P.M. on Election Day NM ADC 1.10.22 (8) (H).

⁴⁰ See Andersen, *op. cit.* pgs. 23 – 24 for an analysis of the significant effect of counting out-of-precinct ballots. The Election Day Survey found that, "Most notably, jurisdictions that permitted jurisdiction-wide acceptance of provisional ballots reported higher rates of provisional ballots being cast, but also reported a much higher incidence of provisional ballots being counted, than other jurisdictions."

⁴¹ Chances are administrative error accounts for the voter being directed to the wrong precinct under these circumstances.

4. Officials should follow a written procedure, and perhaps a checklist, to identify the reason why a provisional ballot is rejected (e.g., check the applicable box "unregistered voter"; "lack of signature match" "wrong precinct," etc.) Those forms should be disclosed publicly when completed. Colorado's election rules offer particularly clear guidance to the official evaluating a provisional ballot.⁴²

Colorado Rejection Codes (Any ballot given a rejection code shall not be counted):

RFS	(Rejection federal or state) No federal or state candidates or issues to duplicate.
RNS	(Rejection not signed) Provisional Ballot Affidavit not signed.
RIN	(Rejection incomplete information provided) Required information is incomplete and the designated election official is unable to confirm voter's eligibility.
RNR	(Rejection not registered) Voter did not register by the voter registration deadline or by emergency registration, Colorado voter registration record was not found, or voter was previously cancelled and has not been reinstated pursuant to 1-2-605(10). C.R.S.
REE	(Rejection envelope empty) Provisional ballot envelope is empty.
RAB	(Rejection voter voted absentee) Designated election official has confirmed that voter voted an absentee ballot.
REV	(Rejection based on ballot cast in early voting) Voter voted early.
RIP	(Rejection based on incorrect party) Incorrect Party in Primary Election.
RFE	(Rejection felon not eligible to vote) Individual was convicted of a felony and is either serving a sentence of confinement or detention or is on parole.
RWC	(Rejection elector not registered in county or State of Colorado) Non-county or non-state resident; therefore voter not eligible to vote in the county where the provisional ballot was voted.
RID	(Rejection first time voter has not supplied identification upon registration or thereafter prior to and during time voter voted) First Time Voter who registered by mail or through a voter registration drive, is tagged as id deficient, and did not provide id at the time of voting.
RRD	(Rejection registration deficient) Voter had deficient or incomplete registration and required information was not provided prior to or at the time of filling in the provisional ballot envelope. Voter's eligibility cannot be established.

D. Verification of Provisional Ballots

1. States that use the information on the provisional ballot to permit voters who have changed their addresses to update their registrations should adopt clear procedures on that process and specify how the new information will be communicated between different Boards of Elections.
2. In verifying provisional ballots, the time by which election officials must make their eligibility determinations is particularly important in presidential elections because of the need to certify electors to the Electoral College. States should consider in particular how to divide the time constraints imposed in presidential election by the safe-harbor provisions regarding certification to the Electoral College. Some part of this five-week period will be consumed by the eligibility evaluation, but states should take care to provide a sufficient period of time as well for challenges. If a state consumes 21 days

⁴² 8 CCR 1505-1, at 26.5.4, adopted august 4, 2005. See also 1-2-509(3) C.R.S.

following the election in the eligibility evaluations, only two weeks will remain for legal challenges to be concluded. Is that sufficient? Or should the state provide the resources needed to complete the eligibility determinations in 10 days or two weeks, leaving three weeks or more for legal challenges in a close election? Our research did not identify an optimum division of the five weeks available. The prudent course here would be to encourage states to consider the issue and then make a careful decision about how to complete all steps in the evaluation of ballots and challenges to those determinations within the five weeks available.

E. Post-election Information for Voters

Timely information to voters about the disposition of their provisional ballot will provide helpful feedback and more important enable voters to determine if they are registered for future elections and, if not, what they need to do to become registered.

1. Establish mechanisms to ensure that voters casting provisional ballots are informed whether they are now registered for future elections and, if not, what they need to do to become registered.

F. State Laws Governing Litigation over Provisional Voting

1. Establish special, streamlined litigation procedures for Election Day complaints that individuals are being denied the right to cast a provisional ballot.

Broader Considerations

G. Integrity and the Appearance of Integrity

1. State laws or regulations providing for non-partisan or bi-partisan bodies to make a public determination of the validity of provisional ballots would increase confidence in the system.
2. To improve transparency, state laws or regulations should require the purging process for registration to be public and with an opportunity for voters to correct an erroneous determination that they should be purged.
3. State laws or regulation should require the evaluation process for provisional ballots to be public, while protecting the names of those who voted provisionally.

H. Continuous Assessment of the Provisional Ballot -- Process and Performance

Defining what makes for a successful provisional voting system is difficult. The most successful system is probably not the one with the most provisional votes cast (that could indicate problems with the registration system). Nor is the system with the greatest number counted or with the fewest counted necessarily superior because the evaluation process could be flawed.

Defining quality requires a broad perspective about how well the system works, how open it is to error recognition and correction, and how well provisional voting processes are connected to the registration and voter identification regimes. The EAC should consider engaging one of the national quality organizations or processes, such as Six Sigma⁴³ or the Baldrige Quality

⁴³ Six Sigma is a measure of quality that strives for near perfection. Six Sigma is a disciplined, data-driven approach and methodology for eliminating defects (driving towards six standard deviations between the mean and the nearest specification limit) in any process -- from manufacturing to transactional and from product to service.

process⁴⁴ to evaluate the provisional ballot process. Pending such a review, the EAC can recommend that states take the following actions.

1. Recognize that the first step to improving quality is to see the provisional voting process as a system and take a systems approach to regular evaluation through standardized metrics with explicit goals for performance.
2. States should begin by collecting data systematically on the provisional voting process so that they can evaluate their voting system and assess changes from one election to the next. The effort should start in the 2006 election, and the data collected should include:
 - Provisional votes cast and counted by jurisdiction, say counties, with details on why the voter had to vote provisionally (lack of ID, not on list, challenged at polling place, issued absentee ballot, etc) and number of ballots actually counted in each category.
 - Reasons why provisional ballots were not counted, using categories such as those that have been adopted by Colorado, described earlier in this report.
 - Measures of variance among jurisdictions.
 - Number of poll workers trained in administration of provisional voting by polling place.
 - Number of jurisdictions posting information on provisional voting in the polling place.
 - Time required to evaluate ballots by jurisdiction.

Improving understanding of the provisional voting process through analysis of detailed information will enable state and local election officials to strengthen their systems. By collecting and analyzing this data states can identify which aspects of the registration and electoral system are most important in shunting voters into the provisional ballot process. Responsible officials can then look to their registration system, identification requirements or poll worker training as a way to reduce the need for voters to cast their ballots provisionally.

⁴⁴ The Baldrige Criteria for Performance Excellence provide a systems perspective for understanding performance management. They reflect validated, leading-edge management practices against which an organization can measure itself. With their acceptance nationally and internationally as the model for performance excellence, the Criteria represent a common language for communication among organizations for sharing best practices. The Criteria are also the basis for the Malcolm Baldrige National Quality Award process.

APPENDIX C: PROVISIONAL BALLOT LITIGATION BY ISSUE

**Moritz College of Law
June 28, 2006**

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Overview:

- **Wrong precinct**
 - *League of Latin American Citizens (LULAC) v. Arizona Secretary of State Jan Brewer*
 - *Colorado Common Cause v. Donetta Davidson*, No. 04CV7709, 2004 WL 2360485 (Colo. Dist. Ct. Oct. 18, 2004)
 - *AFL-CIO v. Hood*, 885 So. 2d 373 (Fla. 2004)
 - *The Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073 (N.D. Fla. 2004)
 - *Dean Brooks et al. v. Attorney General Tom Miller*
 - *Bay County Democratic Party, et al v. Land et al*, 347 F. Supp. 2d 404 (E.D. Mich. 2004)
 - *Claude Hawkins, Brian Morahan, Susan Schilling and the Missouri Democratic Party v. Matt Blunt*
U.S. District Court Western District of Missouri, Case No. 2:04-cv-04177
 - *Panio v. Sunderland*, 4 N.Y.3d 123, 824 N.E.2d 488 (N.Y. 2005)
 - *James v. Bartlet*, 607 S.E. 2d 638, 359 N.C. 260 (N.C. 2005)
 - *The League of Women Voters of Ohio et al v. Blackwell*, 340 F. Supp. 2d 823 (N.D. Ohio 2004)
 - *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) – *Opinion in Sixth Circuit case*, 10/23/04
Sandusky County Democratic Party v. Blackwell, 361 F. Supp. 2d 688 (6th Cir. 2005) – *Opinion in District Court in Plaintiff's request for attorney's fees, which was granted*, 3/3/05
 - *State of Ohio ex rel. Mackey et al v. Blackwell et al*, No. 85597, 2004 WL 2973976 (Ohio App. 8 Dist. Dec. 22, 2004)
- **Absentee voters who did not receive a ballot who wish to vote provisionally**
 - *Colorado Common Cause v. Donetta Davidson*, No. 04CV7709, 2004 WL 2360485 (Colo. Dist. Ct. Oct. 18, 2004)
 - *White v. Blackwell, et al.*
U.S. District Court for the Northern District of Ohio, Case No. 3:04CV 7689
- **Equal protection – inconsistent treatment or distribution of provisional ballots**
 - *Schering v. Blackwell*
U.S. District Court for the Southern District of Ohio, Case No. 1:04-cv-755.
 - *State of Ohio ex rel. Mackey et al v. Blackwell et al*, No. 85597, 2004 WL 2973976 (Ohio App. 8 Dist. Dec. 22, 2004)
- **Provisional ballots which were incomplete in some way (not signed, do not display election district, etc.)**
 - *Panio v. Sunderland*, 4 N.Y.3d 123, 824 N.E.2d 488 (N.Y. 2005)
 - *Borders v. King County*
Superior Court, Chelan County, No. 05-2-00027-3
- **Requirement for provisional ballot to be counted – ID required**

- *Bay County Democratic Party, et al v. Land et al*, 347 F. Supp. 2d 404 (E.D. Mich. 2004)
- *The League of Women Voters of Ohio et al v. Blackwell*, 340 F. Supp. 2d 823 (N.D. Ohio 2004)
- **Verification procedure for provisional ballots**
 - *State of Ohio ex rel. Mackey et al v. Blackwell et al*, No. 85597, 2004 WL 2973976 (Ohio App. 8 Dist. Dec. 22, 2004)
 - *Borders v. King County*
Superior Court, Chelan County, No. 05-2-00027-3
 - *McDonald, et al v. Secretary of State*, 103 P.3d 722 (Wash. 2004)
 - *Washington State Democratic Party v. King County Records, Elections & Licensing Services Division*
Superior Court, King County, 04-2-36048-0 SEA
- **Provisional v. regular ballot for voter who properly registered but was left off election rolls**
 - *Citizens Alliance for Secure Elections v. Michael Vu*
U.S. District Court for the Northern District of Ohio, Case No. 1:04CV2147
- **Voters who have moved and not updated their registration**
 - *Citizens Alliance for Secure Elections v. Michael Vu*
U.S. District Court for the Northern District of Ohio, Case No. 1:04CV2147
- **Provisional ballots cast by voters who claimed that someone else voted in their place and signed precinct record**
 - *Panio v. Sunderland*, 4 N.Y.3d 123, 824 N.E.2d 488 (N.Y. 2005)
- **Disclosure to a political party of provisional votes in danger of being rejected**
 - *Washington State Democratic Party v. King County Records, Elections & Licensing Services Division*
Superior Court, King County, 04-2-36048-0 SEA
- **Provisional ballots incorrectly tabulated with regular ballots**
 - *Borders v. King County*
Superior Court, Chelan County, No. 05-2-00027-3
- **Re-canvassing ballots previously rejected**
 - *McDonald, et al v. Secretary of State*, 103 P.3d 722 (Wash. 2004)
 - *Washington State Republican Party v. King County Division of Records*, 103 P.3d 725 (Wash. 2004)

Full Summaries:

Wrong Precinct

- ***League of Latin American Citizens (LULAC) v. Arizona Secretary of State Jan Brewer***
 - ISSUE: wrong precinct
 - Lawsuit claims Arizona state policy to not count provisional ballots that were cast in the wrong precinct violates HAVA and the Equal Protection Clause of the 14th Amendment. Electionline.org – Litigation Summary (Feb. 14, 2005), <http://www.electionline.org/Portals/1/Publications/litigation.update.Feb.14.05.pdf>.
 - RESULT: N/A
 - RATIONALE: N/A
- ***Colorado Common Cause v. Donetta Davidson*, No. 04CV7709, 2004 WL 2360485 (Colo. Dist. Ct. Oct. 18, 2004)**
 - ISSUE: wrong precinct; absentee voters getting provisional ballots
 - Lawsuit challenges a state guideline that prohibits anyone voting in the wrong precinct from casting a ballot in any race but the presidential election based on HAVA and the Constitution (fundamental rights challenge). 2004 WL 2360485, at *1.
 - Challenges state guideline that provisional ballots will not be counted if the voter applied for an absentee ballot based on HAVA and the Constitution (fundamental rights challenge). 2004 WL 2360485, at *1.
 - RESULT: votes cast in the wrong precinct may only count for president and vice president; provisional votes cast by voters who applied for absentee ballots must be counted.
 - RATIONALE:
 - Court felt that Congress had no intent to eliminate precinct-based voting, a constitutional form of organizing voting; therefore, votes cast in the wrong precinct may not be counted for county-wide issues. 2004 WL 2360485, at *11. Court also felt that the legislative history behind HAVA's passage supported this notion. *Id.*
 - Court felt that requiring voters to vote in the correct precinct is not an unconstitutional infringement on the right to vote. 2004 WL 2360485, at *14. The impact of the requirement is further lessened by the fact that poll workers will direct the voter to the correct precinct. *Id.* In addition, the Court felt that there was a compelling interest in preventing voter fraud furthered by the precinct system. *Id.*
 - The Court left the door open to the possibility that state-wide voting may be possible after a state-wide computerized database is established in 2006. *Id.*
 - Court felt that not allowing voters who requested an absentee ballot to vote provisionally would conflict with the purpose of HAVA to ensure that registered and eligible voters are allowed to vote provisionally. 2004 WL 2360485, at *11, 12.

- ***AFL-CIO v. Hood*, 885 So. 2d 373 (Fla. 2004)**
 - ISSUE: wrong precinct
 - Lawsuit claimed that the precinct system was an unnecessary and unconstitutional infringement on the right to vote under the Florida and U.S. Constitutions. 885 So.2d at 374.
 - RESULT: votes cast in the wrong precinct may be rejected and not counted.
 - RATIONALE: Precinct based system is a regulation of the voting process not a qualification placed on the voter and could have been reasonably deemed necessary to protect the integrity of the voting process. 885 So.2d at 376.
- ***The Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073 (N.D. Fla. 2004)**
 - ISSUE: wrong precinct
 - Right to provisional ballot if in the wrong precinct (conceded by Florida prior to Order Granting Preliminary Injunction)
 - Right for vote to be counted if cast in the wrong precinct based on interpretation of HAVA language.
 - 342 F. Supp. 2d at 1074.
 - RESULT: voters in the wrong precinct are entitled to a provisional ballot, but are not entitled to have that vote counted if cast in the wrong precinct. 342 F. Supp. 2d at 1083.
 - RATIONALE:
 - Reading the statute to mean that a voter must be eligible at that polling place is consistent with HAVA's purpose, to allow voters to vote when they appear at the polling place, not to eliminate precinct voting. 342 F. Supp. 2d at 1079.
 - Reading is also consistent with votes being counted "in accordance with State law." 342 F. Supp. 2d at 1080.
 - Reading consistent with legislative history which says that poll workers should direct voters to the correct precinct not allow voters to vote at any polling site. 342 F. Supp. 2d at 1080.
 - "Eligible" in HAVA language means registered, 18 years of age, has lived in State for at least 30 days. 342 F. Supp. 2d at 1080.
 - HAVA intended to safeguard voter's right to vote but allow state law to determine whether that vote counts. 342 F. Supp. 2d at 1080.
 - Because election workers may make mistakes with on-the-spot determinations of the voter's polling place, a voter may not be denied a provisional ballot because an election official determined that he/she is at the wrong polling place. 342 F. Supp. 2d at 1081.
- ***Dean Brooks et al. v. Attorney General Tom Miller***
 - ISSUE: wrong precinct
 - Challenge Attorney General decision that votes cast in the correct county but wrong precinct should be counted for Congress and President and Vice President only. Electionline.org – Litigation Summary (Feb. 14, 2005), <http://www.electionline.org/Portals/1/Publications/litigation.update.Feb.14.05.pdf>.

- RESULT: N/A
- RATIONALE: N/A
- ***Bay County Democratic Party, et al v. Land et al*, 347 F. Supp. 2d 404 (E.D. Mich. 2004)**
 - ISSUE: wrong precinct; identification requirement for ballot to count
 - Lawsuit challenges Secretary of State's directive that votes cast in the wrong precinct but correct township, city, or village should not be counted based on HAVA. 347 F. Supp. 2d at 427-34.
 - Lawsuit challenges Secretary of State's directive that first time voters should be required to provide identification within six days of election day in order for their votes to count under HAVA, the Fourteenth Amendment to the Constitution, Michigan election law, and the Equal Protection Clause of the Michigan Constitution. 347 F. Supp. 2d at 434-35.
 - RESULT [but later overruled by Sixth Circuit]: votes cast in the wrong precinct but correct city, village, or township should be counted; identification may be required of provisional voters after the election in order for their votes to count. 347 F. Supp. 2d at 438.
 - RATIONALE:
 - With regard to the wrong precinct issue, the Court relies on the District Court decision in *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975, 992-93 (N.D. Ohio 2004). *Bay County*, 347 F. Supp. 2d at 431-32.
 - The Court also relies on the "plain language" of HAVA – votes are to be counted in accordance with state law (dictates the *procedure* of counting); whether or not votes are counted is decided under HAVA; votes under HAVA are counted if the voter is "eligible" to vote. 347 F. Supp. 2d at 431-32.
 - With regard to the identification requirement, the Court found that the requirement was reasonable; that preventing voter fraud is a compelling interest; and that the requirement is applied uniformly and in a nondiscriminatory manner. 347 F. Supp. 2d at 435.
 - **OVERRULED**: 6th Circuit ruled that votes in the wrong precinct should not be counted and interpreted "jurisdiction," "eligible," and the HAVA provision concerning provisional ballots differently. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004).
- ***Claude Hawkins, Brian Morahan, Susan Schilling and the Missouri Democratic Party v. Matt Blunt***
 U.S. District Court Western District of Missouri, Case No. 2:04-cv-04177
 - ISSUE: wrong precinct
 - Plaintiffs claim that not counting provisional votes cast in the wrong precinct is in violation of HAVA (preemption argument). Order denying Plaintiffs' Motion for Summary Judgment, granting Defendants' Motion for Summary Judgment 3.
 - But the Secretary of State later decided to count those provisional ballots in which the voter was not directed to the

correct polling place, so this issue was considered moot.
Order 11.

- Plaintiffs also disputed a provision of Missouri law which states that a voter should be directed to the correct polling place in lieu of receiving a provisional ballot. Order 10, 12. The provision has been interpreted to mean that if a voter refuses to go to the correct polling place, he shall be given a provisional ballot, which will not be counted (allege it is inconsistent with HAVA - preemption). Order 10, 12.
 - Allege that the Missouri law implementing HAVA “frustrates the intent” of HAVA. Order 13.
- Plaintiffs also allege that the Missouri law violates the Equal Protection Clause because the decision not to count ballots cast at an incorrect polling place is arbitrary. Order 21.
- RESULT: Provisional ballots cast in the wrong precinct should be thrown out provided that the voter was directed to correct precinct. Order.
- RATIONALE:
 - HAVA was intended to be flexible in the way in which states could implement it, evidenced by use of the phrase “eligible under state law to vote.” Order 14.
 - This reference to state law gives states the power to define voter qualifications for provisional ballots including where they can be cast in order to be counted. *Id.*
 - Court relies on statements of Sen. Bond and other HAVA supporters, stating that they did not intend to overturn State law regarding the jurisdiction in which a ballot must be cast and that poll workers should direct the voter to the correct polling place in the event of confusion. Order 15-16.
 - The laws do not violate the Equal Protection Clause because the goals and objectives of the precinct system are legitimate, and it guarantees those eligible to vote may do so. Order 22. The system is rationally related to ensuring a fair election. *Id.*
- ***Panio v. Sunderland*, 4 N.Y.3d 123, 824 N.E.2d 488 (N.Y. 2005)**
 - ISSUES: wrong precinct; voters who voted provisionally because other voters had signed poll ledger in their place; provisional ballots in which the envelope did not identify the election district of the voter
 - Claims all based on N.Y. election law – once case got to Supreme Court, no claims based on Constitution or HAVA.
 - RESULT:
 - Provisional votes in which the voter was in the correct polling place, but wrong district should be counted; voters in the wrong polling place and wrong district should not be counted. 4 N.Y. 3d at 128.
 - Provisional ballots cast by voters who claimed that another voter voted in his/her place and signed the precinct ledger should not be counted. 4 N.Y. 3d at 129.

- Provisional ballots in which the election district was not identified on the envelope should be counted. 4 N.Y. 3d at 129.
- RATIONALE: provisional ballots should be counted if the ballots were in dispute only as a result of ministerial errors by the election board. 4 N.Y. 3d at 129.
 - Ballots cast in the correct polling place but wrong district were counted because they were assumed to be the result of ministerial error; the election officers should have directed the voter to the correct voting table. 4 N.Y. 3d at 128. Ballots cast in the wrong polling place and district were not counted because it would be unreasonable to require poll workers to ensure that voters are at the correct polling site. *Id.*
 - Provisional votes cast by voters who claimed another voter had voted in their place earlier were not counted because of the possibility of fraud. 4 N.Y. 3d at 129.
 - Provisional ballots lacking the election district on the envelope were counted because they were cast in the correct election district, and mishandling by election officials caused the ballots to become unidentifiable with a district (election officials placed post-it notes on the ballots containing the missing information, but the notes later fell off). 4 N.Y. 3d at 129.
- DISPOSITION: application for rehearing denied – 2/7/05
- **James v. Bartlet, 607 S.E. 2d 638, 359 N.C. 260 (N.C. 2005)**
 - ISSUE: wrong precinct
 - Whether or not ballots cast outside the voter's home precinct should be counted as long as the voter casts a ballot for races in his home precinct. 607 S.E. 2d at 640.
 - RESULT: NC state law requires voters to vote in the correct precinct; therefore, votes cast in the wrong precinct were not counted for state and local elections (did not discuss federal elections). 607 S.E. 2d at 645.
 - RATIONALE:
 - Plain language of state statute requires that the voter be a resident of the precinct he votes in and registers in (refers to "the precinct" versus "a precinct"). 607 S.E. 2d at 642.
 - No intent to enable voters to vote outside their precincts by Congress or state legislature in enacting provisional ballot statutes. 607 S.E. 2d at 643.
 - Administrative Code sets out precise circumstances under which a voter may vote a provisional ballot and specifies that the voter must reside in the precinct. 607 S.E. 2d at 643.
 - Court may not remedy Election Board's decision to give provisional ballots to voters in a manner not authorized by State law. 607 S.E. 2d at 644.
 - Advantages of the precinct system: caps number of voters at one polling place; allows there to be one uniform ballot for all voters at that polling place; ballots may list only those elections a voter may

vote for (less confusing); easier to monitor fraud; and it puts polling places closer to people's homes. 607 S.E. 2d at 644-45.

- ***The League of Women Voters of Ohio et al v. Blackwell*, 340 F. Supp. 2d 823 (N.D. Ohio 2004)**

- ISSUES: wrong precinct & identification requirement for ballot to count
 - Wrong precinct issue. 340 F. Supp. 2d at 824.
 - Whether identification provided on election day should be required of provisional voters (voting provisionally because of ID requirement) in order for ballot to count. 340 F. Supp. 2d at 828.
 - Claim that it will cause provisional ballots voted by voters without identification (who cannot remember their numerical identifier, do not have a numerical identifier, or cannot return to the polls prior to closing) to be rejected.
 - Fourteenth Amendment fundamental rights claim.
 - Claim under HAVA based on interpretation of the "eligible" language.
- RESULT:
 - Wrong precinct issue decided already in *Sandusky County Democratic Party*, and even though it was on appeal at the time of the decision, the Judge decided that the relief granted (or not) from that case would be sufficient to serve the interests of these plaintiffs as well (he did not reach a decision on the issue). 340 F. Supp. 2d at 824.
 - Identification or oral recitation of identification number (DL or SS) may be required before the polls close in order for a provisional ballot to count. 340 F. Supp. 2d at 831.
- RATIONALE:
 - Identification may be required to preserve the integrity of elections and prevent voter fraud, which outweighs the interest in ensuring that every ballot count. 340 F. Supp. 2d at 829. Further, there is no less burdensome way to detect and prevent election fraud. *Id.*
 - Identification may be required because HAVA allows it; the requirement affects a small number of voters (registered by mail, voting for the first time, have no identification, cannot recite a numerical identifier); it is easy to obtain the identification information (telephone, quick return home); and notice is given of the requirement on the registration form. 340 F. Supp. 2d at 830.
 - Identification may be required because HAVA's language about "eligible under State law to vote" only means that the name on the registration form is eligible to vote. 340 F. Supp. 2d at 831. A voter must still prove that he/she is the same person as the person on the registration form, who is "eligible" to vote under State law, and proving identity is a reasonable burden. *Id.*

- ***Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975 (N.D. Ohio 2004)** – Order in District Court case, 10/14/04
- Sandusky County Democratic Party v. Blackwell*, 340 F. Supp. 2d 815 (N.D. Ohio 2004)** – Order in District Court case, 10/20/04
- Sandusky County Democratic Party v. Blackwell*, 386 F.3d 815 (6th Cir. 2004)**. – Order in Sixth Circuit case, 10/23/04
- Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004)** – Opinion in Sixth Circuit case, 10/23/04
- Sandusky County Democratic Party v. Blackwell*, 361 F. Supp. 2d 688 (6th Cir. 2005)** – Opinion in District Court in Plaintiff's request for attorney's fees, which was granted, 3/3/05
 - ISSUE: wrong precinct
 - Plaintiffs claim that a Directive by the Secretary of State denies provisional ballots to voters inadvertently purged from voter lists or to those who go to the wrong precinct and only allows provisional ballots to voters who have moved and not updated their registration. Complaint 2-3.
 - Claim that this violates the purpose of HAVA – to ensure that all electors are eligible to vote provisionally. 339 F. Supp. 2d 975.
 - Claim that “jurisdiction” means the same as the geographic unit which maintains voter registration rolls and the same as its meaning in the NVRA. 387 F.3d at 574-75.
 - Statutory claim that HAVA provides an absolute right to cast a provisional ballot which counts provided that the voter is registered and eligible. Complaint 6-7.
 - Provisional ballots should be given to every voter who attempts to vote in the correct county but not necessarily the correct precinct. Complaint 10-11.
 - Claim that a voter (who has moved) who goes to one polling place attempting to vote and then goes to the other later should be allowed a provisional ballot. Complaint 12, 14.
 - RESULT: Votes cast in the wrong precinct may not be counted by a state, but voters must be permitted to cast them. 386 F.3d at 816. HAVA secures the right to cast a provisional ballot; the legality of the ballot must be determined under state law. 386 F.3d at 576.
 - RATIONALE:
 - Precinct system rooted in tradition; no indication Congress wished to completely overhaul the voting system of most states. 387 F.3d at 568; 387 F.3d at 576.
 - Advantages of precinct system: caps the number of voters at one place; allows ballot for all voters at one precinct to be the same for all elections; ballot lists only elections the voter may vote for (less confusing); easier to monitor and prevent fraud; and puts polling places closer to voter's homes. 387 F.3d at 569.

- Court believes that the totality of the legislative history supports the notion that jurisdiction equals precinct, and votes cast outside the voter's precinct should not be counted under HAVA. 387 F.3d at 575.
- The District Court's broad reading of "eligible under state law to vote" leads to the conclusion that a voter could vote multiple times in one election, and all of the provisional ballots would count if state law is not used to determine eligibility (since it is Ohio not federal law that specifies that a voter can vote only once).
- Court relies on the presumption that Congress must be clear in order to alter the state-federal balance; thus, Congress would have been more clear if it intended to eliminate state control over polling location. 387 F.3d at 578.
- But a provisional ballot must be provided to a voter, as HAVA's purpose was to prevent on-the-spot denials of ballots to voters determined ineligible by precinct workers. 387 F.3d at 574.
 - Court believes that HAVA's provisional voting was designed to compensate for the impossibility of having election officials with "perfect knowledge." 387 F.3d at 570. Under this rationale, provisional voting is used when a voter's eligibility in that precinct cannot be verified, but the voter insists that he/she is eligible because it is possible that the election officials do not have perfect information. *Id.*
- ***State of Ohio ex rel. Mackey et al v. Blackwell et al*, No. 85597, 2004 WL 2973976 (Ohio App. 8 Dist. Dec. 22, 2004)**
 - ISSUES: equal protection issue & wrong precinct issue & how verification (against registration records) procedure should be conducted
 - Equal protection issue from different treatment on whether a voter should have a provisional ballot and different treatment on whether a provisional vote should be counted.
 - Claim that there were inconsistent standards for determining whether or not a voter received a provisional ballot in violation of the Equal Protection Clause. Original Action in Mandamus 2.
 - Claim that there were inconsistent standards for determining whether or not to count a provisional ballot in violation of the Equal Protection Clause. Original Action in Mandamus 2, 9.
 - Claim that votes cast in the wrong precinct should be counted given that many voters did not receive assistance to correct precinct, as required by Secretary of State's directive. Original Action in Mandamus 3, 16-17.
 - Claim that provisional ballots lacking a signature, HAVA-sticker, or other required information on the envelope were wrongfully rejected – allege that these are nonmaterial errors in violation of VRA. Original Action in Mandamus 6-7, 11, 14.

- Claim that provisional ballots should be verified by hand against registration records rather than only against computerized records. Original Action in Mandamus 12-13.
 - Allege that database was incomplete – some registration forms were not indexed and accessible to poll workers. *Id.*
 - Allege that registration forms were erroneously processed. *Id.*
- RESULT: Dismissed for failure to state a claim upon which relief can be granted. 2004 WL 2973976, at *2.

Absentee voters who did not receive a ballot who wish to vote provisionally

- ***Colorado Common Cause v. Donetta Davidson*, No. 04CV7709, 2004 WL 2360485 (Colo. Dist. Ct. Oct. 18, 2004)**
 - ISSUE: wrong precinct; absentee voters getting provisional ballots.
 - Lawsuit challenges a state guideline that prohibits anyone voting in the wrong precinct from casting a ballot in any race but the presidential election based on HAVA and the Constitution (fundamental rights challenge). 2004 WL 2360485, at *1.
 - Challenges state guideline that provisional ballots will not be counted if the voter applied for an absentee ballot based on HAVA and the Constitution (fundamental rights challenge). 2004 WL 2360485, at *1.
 - RESULT: votes cast in the wrong precinct may only count for president and vice president; provisional votes cast by voters who applied for absentee ballots must be counted.
 - RATIONALE:
 - Court felt that Congress had no intent to eliminate precinct-based voting, a constitutional form of organizing voting; therefore, votes cast in the wrong precinct may not be counted for county-wide issues. 2004 WL 2360485, at *11. Court also felt that the legislative history behind HAVA's passage supported this notion. *Id.*
 - Court felt that requiring voters to vote in the correct precinct is not an unconstitutional infringement on the right to vote. 2004 WL 2360485, at *14. The impact of the requirement is further lessened by the fact that poll workers will direct the voter to the correct precinct. *Id.* In addition, the Court felt that there was a compelling interest in preventing voter fraud furthered by the precinct system. *Id.*
 - The Court left the door open to the possibility that state-wide voting may be possible after a state-wide computerized database is established in 2006. *Id.*
 - Court felt that not allowing voters who requested an absentee ballot to vote provisionally would conflict with the purpose of HAVA to ensure that registered and eligible voters are allowed to vote provisionally. 2004 WL 2360485, at *11, 12.
- ***White v. Blackwell, et al.***
U.S. District Court for the Northern District of Ohio, Case No. 3:04CV 7689
 - ISSUE: absentee voters getting provisional ballots

- Absentee voters who failed to receive absentee ballots in the mail who wish to vote provisionally at the polls under HAVA.
 - Claim under HAVA that the Secretary of State and Board of Elections interpreted HAVA incorrectly. Complaint 8.
- RESULT: Anyone who shows up to the polls and asserts eligibility to vote shall be permitted to cast a provisional ballot, including those who previously requested an absentee ballot. Memorandum Opinion and Order 3-4.
- RATIONALE: HAVA, as interpreted in *Sandusky County Democratic Party*, is clear, anyone who asserts eligibility to vote is able to receive a provisional ballot under HAVA. Memorandum Opinion 3-4.

Equal protection – inconsistent treatment or distribution of provisional ballots

- ***Schering v. Blackwell***
U.S. District Court for the Southern District of Ohio, Case No. 1:04-cv-755.
 - ISSUE: equal protection issue
 - Plaintiffs allege that the process for evaluating provisional ballots in Ohio violates the Equal Protection Clause; want uniform standards for evaluating provisional ballots
 - RESULT: Plaintiffs filed a stipulated dismissal. 3/15/05
 - Case never reached opinion.
- ***State of Ohio ex rel. Mackey et al v. Blackwell et al*, No. 85597, 2004 WL 2973976 (Ohio App. 8 Dist. Dec. 22, 2004)**
 - ISSUES: equal protection issue & wrong precinct issue & how verification (against registration records) procedure should be conducted
 - Equal protection issue from different treatment on whether a voter should have a provisional ballot and different treatment on whether a provisional vote should be counted.
 - Claim that there were inconsistent standards for determining whether or not a voter received a provisional ballot in violation of the Equal Protection Clause. Original Action in Mandamus 2.
 - Claim that there were inconsistent standards for determining whether or not to count a provisional ballot in violation of the Equal Protection Clause. Original Action in Mandamus 2, 9.
 - Claim that votes cast in the wrong precinct should be counted given that many voters did not receive assistance to correct precinct, as required by Secretary of State's directive. Original Action in Mandamus 3, 16-17.
 - Claim that provisional ballots lacking a signature, HAVA sticker, or other required information on the envelope were wrongfully rejected – allege that these are nonmaterial errors in violation of VRA. Original Action in Mandamus 6-7, 11, 14.
 - Claim that provisional ballots should be verified by hand against registration records rather than only against computerized records. Original Action in Mandamus 12-13.

- Allege that database was incomplete – some registration forms were not indexed and accessible to poll workers. *Id.*
- Allege that registration forms were erroneously processed. *Id.*
- RESULT: Dismissed for failure to state a claim upon which relief can be granted. 2004 WL 2973976, at *2.

Provisional ballots which were incomplete in some way (not signed, do not display election district, etc.)

- ***Panio v. Sunderland*, 4 N.Y.3d 123, 824 N.E.2d 488 (N.Y. 2005)**
 - ISSUES: wrong precinct; voters who voted provisionally because other voters had signed poll ledger in their place; provisional ballots in which the envelope did not identify the election district of the voter
 - Claims all based on N.Y. election law – once case got to Supreme Court, no claims based on Constitution or HAVA.
 - RESULT:
 - Provisional votes in which the voter was in the correct polling place, but wrong district should be counted; voters in the wrong polling place and wrong district should not be counted. 4 N.Y. 3d at 128.
 - Provisional ballots cast by voters who claimed that another voter voted in his/her place and signed the precinct ledger should not be counted. 4 N.Y. 3d at 129.
 - Provisional ballots in which the election district was not identified on the envelope should be counted. 4 N.Y. 3d at 129.
 - RATIONALE: provisional ballots should be counted if the ballots were in dispute only as a result of ministerial errors by the election board. 4 N.Y. 3d at 129.
 - Ballots cast in the correct polling place but wrong district were counted because they were assumed to be the result of ministerial error; the election officers should have directed the voter to the correct voting table. 4 N.Y. 3d at 128. Ballots cast in the wrong polling place and district were not counted because it would be unreasonable to require poll workers to ensure that voters are at the correct polling site. *Id.*
 - Provisional votes cast by voters who claimed another voter had voted in their place earlier were not counted because of the possibility of fraud. 4 N.Y. 3d at 129.
 - Provisional ballots lacking the election district on the envelope were counted because they were cast in the correct election district, and mishandling by election officials caused the ballots to become unidentifiable with a district (election officials placed post-it notes on the ballots containing the missing information, but the notes later fell off). 4 N.Y. 3d at 129.
 - DISPOSITION: application for rehearing denied – 2/7/05

- ***Borders v. King County***

Superior Court, Chelan County, No. 05-2-00027-3 [election contest filed 1/7/05 contesting the certification of the results of the election, decision 6/6/05]

- ISSUES: provisional ballots incorrectly tabulated with regular ballots before being verified; verification for provisional ballots; provisional ballots without labels. Court's Oral Decision 6/6.
 - Provisional ballots cast directly into electronic voting machine or ballot tabulated before it was verified. Court's Oral Decision 6/6.
 - No signature or registration verification conducted for certain provisional ballots. Court's Oral Decision 6/6.
- RESULT: election not overturned – even though illegal votes cast – no proof who they were cast for or whether the voter voted in the particular race at all. Court's Oral Decision 6/6.
- RATIONALE:
 - Cannot prove whether a voter voted for a particular race; do not know which ballots were illegal. Court's Oral Decision 6/6.
 - No evidence of actual ballot stuffing. Court's Oral Decision 6/6.
 - Reconciliation issues and irregularities are common in elections. Court's Oral Decision 6/6.
 - No evidence the irregularities were intentional. Court's Oral Decision 6/6.
 - Probability techniques (proportional deduction) used to predict who an illegal voter voted for are not generally accepted scientific techniques. Court's Oral Decision 6/6.
 - Judicial restraint from interfering with elections. Court's Oral Decision 6/6.
 - Precedent – challenge under a WA statute, which previously had been interpreted to require direct or indirect wrongdoing by someone intending for the irregularity to help one candidate. Court's Oral Decision 6/6.

Requirement for provisional ballot to be counted – ID required

- ***Bay County Democratic Party, et al v. Land et al*, 347 F. Supp. 2d 404 (E.D. Mich. 2004)**

- ISSUE: wrong precinct; identification requirement for ballot to count
 - Lawsuit challenges Secretary of State's directive that votes cast in the wrong precinct but correct township, city, or village should not be counted based on HAVA. 347 F. Supp. 2d at 427-34.
 - Lawsuit challenges Secretary of State's directive that first time voters should be required to provide identification within six days of election day in order for their votes to count under HAVA, the Fourteenth Amendment to the Constitution, Michigan election law, and the Equal Protection Clause of the Michigan Constitution. 347 F. Supp. 2d at 434-35.
- RESULT [but later overruled by Sixth Circuit]: votes cast in the wrong precinct but correct city, village, or township should be counted;

identification may be required of provisional voters after the election in order for their votes to count. 347 F. Supp. 2d at 438.

○ RATIONALE:

- With regard to the wrong precinct issue, the Court relies on the District Court decision in *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975, 992-93 (N.D. Ohio 2004). *Bay County*, 347 F. Supp. 2d at 431-32.
- The Court also relies on the “plain language” of HAVA – votes are to be counted in accordance with state law (dictates the *procedure* of counting); whether or not votes are counted is decided under HAVA; votes under HAVA are counted if the voter is “eligible” to vote. 347 F. Supp. 2d at 431-32.
- With regard to the identification requirement, the Court found that the requirement was reasonable; that preventing voter fraud is a compelling interest; and that the requirement is applied uniformly and in a nondiscriminatory manner. 347 F. Supp. 2d at 435.

○ **OVERRULED:** 6th Circuit ruled that votes in the wrong precinct should not be counted and interpreted “jurisdiction,” “eligible,” and the HAVA provision concerning provisional ballots differently. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004).

• ***The League of Women Voters of Ohio et al v. Blackwell*, 340 F. Supp. 2d 823 (N.D. Ohio 2004)**

○ ISSUES: wrong precinct & identification requirement for ballot to count

- Wrong precinct issue. 340 F. Supp. 2d at 824.
- Whether identification provided on election day should be required of provisional voters (voting provisionally because of ID requirement) in order for ballot to count. 340 F. Supp. 2d at 828.
 - Claim that it will cause provisional ballots voted by voters without identification (who cannot remember their numerical identifier, do not have a numerical identifier, or cannot return to the polls prior to closing) to be rejected.
 - Fourteenth Amendment fundamental rights claim.
 - Claim under HAVA based on interpretation of the “eligible” language.

○ RESULT:

- Wrong precinct issue decided already in *Sandusky County Democratic Party*, and even though it was on appeal at the time of the decision, the Judge decided that the relief granted (or not) from that case would be sufficient to serve the interests of these plaintiffs as well (he did not reach a decision on the issue). 340 F. Supp. 2d at 824.
- Identification or oral recitation of identification number (DL or SS) may be required before the polls close in order for a provisional ballot to count. 340 F. Supp. 2d at 831.

○ RATIONALE:

- Identification may be required to preserve the integrity of elections and prevent voter fraud, which outweighs the interest in ensuring that every ballot count. 340 F. Supp. 2d at 829. Further, there is no less burdensome way to detect and prevent election fraud. *Id.*
- Identification may be required because HAVA allows it; the requirement affects a small number of voters (registered by mail, voting for the first time, have no identification, cannot recite a numerical identifier); it is easy to obtain the identification information (telephone, quick return home); and notice is given of the requirement on the registration form. 340 F. Supp. 2d at 830.
- Identification may be required because HAVA's language about "eligible under State law to vote" only means that the name on the registration form is eligible to vote. 340 F. Supp. 2d at 831. A voter must still prove that he/she is the same person as the person on the registration form, who is "eligible" to vote under State law, and proving identity is a reasonable burden. *Id.*

Verification procedure for provisional ballots

- *State of Ohio ex rel. Mackey et al v. Blackwell et al*, No. 85597, 2004 WL 2973976 (Ohio App. 8 Dist. Dec. 22, 2004)
 - ISSUES: equal protection issue & wrong precinct issue & how verification (against registration records) procedure should be conducted
 - Equal protection issue from different treatment on whether a voter should have a provisional ballot and different treatment on whether a provisional vote should be counted.
 - Claim that there were inconsistent standards for determining whether or not a voter received a provisional ballot in violation of the Equal Protection Clause. Original Action in Mandamus 2.
 - Claim that there were inconsistent standards for determining whether or not to count a provisional ballot in violation of the Equal Protection Clause. Original Action in Mandamus 2, 9.
 - Claim that votes cast in the wrong precinct should be counted given that many voters did not receive assistance to correct precinct, as required by Secretary of State's directive. Original Action in Mandamus 3, 16-17.
 - Claim that provisional ballots lacking a signature, HAVA sticker, or other required information on the envelope were wrongfully rejected – allege that these are nonmaterial errors in violation of VRA. Original Action in Mandamus 6-7, 11, 14.
 - Claim that provisional ballots should be verified by hand against registration records rather than only against computerized records. Original Action in Mandamus 12-13.
 - Allege that database was incomplete – some registration forms were not indexed and accessible to poll workers. *Id.*
 - Allege that registration forms were erroneously processed. *Id.*

- RESULT: Dismissed for failure to state a claim upon which relief can be granted. 2004 WL 2973976, at *2.
- ***Borders v. King County***
Superior Court, Chelan County, No. 05-2-00027-3 [election contest filed 1/7/05 contesting the certification of the results of the election, decision 6/6/05]
 - ISSUES: provisional ballots incorrectly tabulated with regular ballots before being verified; verification for provisional ballots; provisional ballots without labels. Court's Oral Decision 6/6.
 - Provisional ballots cast directly into electronic voting machine or ballot tabulated before it was verified. Court's Oral Decision 6/6.
 - No signature or registration verification conducted for certain provisional ballots. Court's Oral Decision 6/6.
 - RESULT: election not overturned – even though illegal votes cast – no proof who they were cast for or whether the voter voted in the particular race at all. Court's Oral Decision 6/6.
 - RATIONALE:
 - Cannot prove whether a voter voted for a particular race; do not know which ballots were illegal. Court's Oral Decision 6/6.
 - No evidence of actual ballot stuffing. Court's Oral Decision 6/6.
 - Reconciliation issues and irregularities are common in elections. Court's Oral Decision 6/6.
 - No evidence the irregularities were intentional. Court's Oral Decision 6/6.
 - Probability techniques (proportional deduction) used to predict who an illegal voter voted for are not generally accepted scientific techniques. Court's Oral Decision 6/6.
 - Judicial restraint from interfering with elections. Court's Oral Decision 6/6.
 - Precedent – challenge under a WA statute, which previously had been interpreted to require direct or indirect wrongdoing by someone intending for the irregularity to help one candidate. Court's Oral Decision 6/6.
- ***McDonald, et al v. Secretary of State, 103 P.3d 722 (Wash. 2004)*** [First Supreme Court review 12/14/04]
 - ISSUE: signature comparison; request for recanvassing of previously rejected ballots
 - Equal Protection Clause claim based on a disparity between signature-checking standards. 153 P.3d at 724.
 - Procedure for comparing signatures used in first canvass did not comport with Washington's statutory and regulatory scheme. 153 P.3d at 724.
 - RESULT: signature verification procedure in first canvass ok; no equal protection violation based on disparity between rejected provisional ballots; ballots may only be retabulated if they were counted or tallied in the previous count.

- RATIONALE:
 - Signature verification procedure used in first canvass was sufficient, as voters were permitted to correct or update signatures until the day prior to the canvass (Nov. 16). 153 P.3d at 724.
 - No equal protection violation, as the petitioners only established a disparity in ballots rejected, not actual disparity in procedures. Also because they did not allege any particular procedure was faulty. 153 P.3d at 724.
- ***Washington State Democratic Party v. King County Records, Elections & Licensing Services Division***
 Superior Court, King County, 04-2-36048-0 SEA [Decision 11/16/04]
 - ISSUE: verifying ballots/disclosure of voters in risk of rejection for signature problems
 - King County elections officials ordered to give the State Democratic Party the names of 929 voters whose provisional ballots may be discarded because of signature problems. Memorandum Opinion 2.
 - Challenge under Public Disclosure Act. Memorandum Opinion 2-3.
 - County argued that HAVA prevented disclosure. *Id.*
 - Challenge under Equal Protection Clause. Memorandum Opinion 4.
 - Republican Party intervened and wanted provisional votes submitted by third parties (such as the Democratic Party) to be rejected, requiring voters to come down to the county board to verify their questioned signature. Memorandum Opinion 5.
 - RESULT: Democrats were entitled to disclosure of the names so that the voters could be contacted to verify their ballots; equal protection claim dismissed. Votes brought in by third parties should be counted.
 - RATIONALE:
 - Identity of voter or disposition of provisional ballots, but not votes cast, are subject to Public Disclosure Act. Memorandum Opinion 4.
 - Disclosure of voters' names leads to greater notice, which is the goal. Memorandum Opinion 4.
 - Equal protection claim – dispute is premature, and the evidence is hypothetical. Memorandum Opinion 4.
 - There is no evidence of fraud, no showing that King County is acting illegally, best protection against fraud is public disclosure, so Republicans' claim is dismissed. Memorandum Opinion 6.

Provisional v. regular ballot for voter who properly registered but was left off election rolls

- ***Citizens Alliance for Secure Elections v. Michael Vu***
 U.S. District Court for the Northern District of Ohio, Case No. 1:04CV2147
 - ISSUE: whether voters who have moved but not updated their registration should receive a provisional ballot or a regular ballot; whether voters inadvertently left off registration rolls should receive a regular or provisional ballot.

- Plaintiffs claim that voters who have moved within the state but not updated their registration should not have to vote a provisional ballot at their new voting location but should instead vote a regular ballot. (Challenge guideline as in conflict with Ohio statute). Order Denying Plaintiffs' Motion for Temporary Restraining Order 2.
- Claim that Board of Elections violated the NVRA when they failed to properly process voter registration applications and properly notify applicants of the status of their incomplete (yet timely) applications. Motion for a Temporary Restraining Order, Memorandum in Support 2-3.
 - Allege clerical errors were made in transcribing registration cards to computer records, which resulted in applications being considered incomplete (and thus, will force those voters to vote a provisional ballot rather than a regular ballot).
 - Allege that Board neglected to register voters whose applications were timely submitted.
- Claim that the Board of Elections actions concerning these "incomplete" and lost registrations disenfranchise voters in violation of the Voting Rights Act. Motion Memorandum in Support 7.
- RESULT: Provisional ballot procedure is sufficient to allow voters who were inadvertently removed from the registration list or should be on the registration list an opportunity to vote – so voters who have moved or were erroneously left off the list are permitted to vote provisionally.
- RATIONALE: Provisional voting system seems reasonably calculated to remedy any situation in which a voter was left off the registered voter lists. Order 4.
- Plaintiffs dismissed their case without prejudice after their request for a temporary restraining order was rejected. Plaintiff's Notice Of Voluntary Dismissal Without Prejudice.

Voters who have moved and not updated their registration

- *Citizens Alliance for Secure Elections v. Michael Vu*
U.S. District Court for the Northern District of Ohio, Case No. 1:04CV2147
 - ISSUE: whether voters who have moved but not updated their registration should receive a provisional ballot or a regular ballot; whether voters inadvertently left off registration rolls should receive a regular or provisional ballot.
 - Plaintiffs claim that voters who have moved within the state but not updated their registration should not have to vote a provisional ballot at their new voting location but should instead vote a regular ballot. (Challenge guideline as in conflict with Ohio statute). Order Denying Plaintiffs' Motion for Temporary Restraining Order 2.
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- RESULT: Provisional ballot procedure is sufficient to allow voters who were inadvertently removed from the registration list or should be on the registration list an opportunity to vote – so voters who have moved or were erroneously left off the list are permitted to vote provisionally.
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- Plaintiffs dismissed their case without prejudice after their request for a temporary restraining order was rejected. Plaintiff’s Notice Of Voluntary Dismissal Without Prejudice.

Provisional ballots cast by voters who claimed that someone else voted in their place and signed precinct record

- *Panio v. Sunderland*, 4 N.Y.3d 123, 824 N.E.2d 488 (N.Y. 2005)
 - ISSUES: wrong precinct; voters who voted provisionally because other voters had signed poll ledger in their place; provisional ballots in which the envelope did not identify the election district of the voter
 - Claims all based on N.Y. election law – once case got to Supreme Court, no claims based on Constitution or HAVA.
 - RESULT:
 - Provisional votes in which the voter was in the correct polling place, but wrong district should be counted; voters in the wrong polling place and wrong district should not be counted. 4 N.Y. 3d at 128.
 - Provisional ballots cast by voters who claimed that another voter voted in his/her place and signed the precinct ledger should not be counted. 4 N.Y. 3d at 129.
 - Provisional ballots in which the election district was not identified on the envelope should be counted. 4 N.Y. 3d at 129.
 - RATIONALE: provisional ballots should be counted if the ballots were in dispute only as a result of ministerial errors by the election board. 4 N.Y. 3d at 129.
 - Ballots cast in the correct polling place but wrong district were counted because they were assumed to be the result of ministerial error; the election officers should have directed the voter to the correct voting table. 4 N.Y. 3d at 128. Ballots cast in the wrong polling place and district were not counted because it would be unreasonable to require poll workers to ensure that voters are at the correct polling site. *Id.*

- Provisional votes cast by voters who claimed another voter had voted in their place earlier were not counted because of the possibility of fraud. 4 N.Y. 3d at 129.
- Provisional ballots lacking the election district on the envelope were counted because they were cast in the correct election district, and mishandling by election officials caused the ballots to become unidentifiable with a district (election officials placed post-it notes on the ballots containing the missing information, but the notes later fell off). 4 N.Y. 3d at 129.
- DISPOSITION: application for rehearing denied – 2/7/05

Disclosure to a political party of provisional votes in danger of being rejected

- *Washington State Democratic Party v. King County Records, Elections & Licensing Services Division*
Superior Court, King County, 04-2-36048-SEA [Decision 11/16/04]
 - ISSUE: verifying ballots/disclosure of voters in risk of rejection for signature problems
 - King County elections officials ordered to give the State Democratic Party the names of 929 voters whose provisional ballots may be discarded because of signature problems. Memorandum Opinion 2.
 - Challenge under Public Disclosure Act. Memorandum Opinion 2-3.
 - County argued that HAVA prevented disclosure. *Id.*
 - Challenge under Equal Protection Clause. Memorandum Opinion 4.
 - Republican Party intervened and wanted provisional votes submitted by third parties (such as the Democratic Party) to be rejected, requiring voters to come down to the county board to verify their questioned signature. Memorandum Opinion 5.
 - RESULT: Democrats were entitled to disclosure of the names so that the voters could be contacted to verify their ballots; equal protection claim dismissed. Votes brought in by third parties should be counted.
 - RATIONALE:
 - Identity of voter or disposition of provisional ballots, but not votes cast, are subject to Public Disclosure Act. Memorandum Opinion 4.
 - Disclosure of voters' names leads to greater notice, which is the goal. Memorandum Opinion 4.
 - Equal protection claim – dispute is premature, and the evidence is hypothetical. Memorandum Opinion 4.
 - There is no evidence of fraud, no showing that King County is acting illegally, best protection against fraud is public disclosure, so Republicans' claim is dismissed. Memorandum Opinion 6.

Provisional ballots incorrectly tabulated with regular ballots

- ***Borders v. King County***

Superior Court, Chelan County, No. 05-2-00027-3 [election contest filed 1/7/05 contesting the certification of the results of the election, decision 6/6/05]

- ISSUES: provisional ballots incorrectly tabulated with regular ballots before being verified; verification for provisional ballots; provisional ballots without labels. Court's Oral Decision 6/6.
 - Provisional ballots cast directly into electronic voting machine or ballot tabulated before it was verified. Court's Oral Decision 6/6.
 - No signature or registration verification conducted for certain provisional ballots. Court's Oral Decision 6/6.
- RESULT: election not overturned – even though illegal votes cast – no proof who they were cast for or whether the voter voted in the particular race at all. Court's Oral Decision 6/6.
- RATIONALE:
 - Cannot prove whether a voter voted for a particular race; do not know which ballots were illegal. Court's Oral Decision 6/6.
 - No evidence of actual ballot stuffing. Court's Oral Decision 6/6.
 - Reconciliation issues and irregularities are common in elections. Court's Oral Decision 6/6.
 - No evidence the irregularities were intentional. Court's Oral Decision 6/6.
 - Probability techniques (proportional deduction) used to predict who an illegal voter voted for are not generally accepted scientific techniques. Court's Oral Decision 6/6.
 - Judicial restraint from interfering with elections. Court's Oral Decision 6/6.
 - Precedent – challenge under a WA statute, which previously had been interpreted to require direct or indirect wrongdoing by someone intending for the irregularity to help one candidate. Court's Oral Decision 6/6.

Re-canvassing ballots previously rejected

- ***McDonald, et al v. Secretary of State, 103 P.3d 722 (Wash. 2004)*** [First Supreme Court review 12/14/04]

- ISSUE: signature comparison; request for recanvassing of previously rejected ballots
 - Equal Protection Clause claim based on a disparity between signature-checking standards. 153 P.3d at 724.
 - Procedure for comparing signatures used in first canvass did not comport with Washington's statutory and regulatory scheme. 153 P.3d at 724.
- RESULT: signature verification procedure in first canvass ok; no equal protection violation based on disparity between rejected provisional ballots; ballots may only be retabulated if they were counted or tallied in the previous count.
- RATIONALE:

- Signature verification procedure used in first canvass was sufficient, as voters were permitted to correct or update signatures until the day prior to the canvass (Nov. 16). 153 P.3d at 724.
- No equal protection violation, as the petitioners only established a disparity in ballots rejected, not actual disparity in procedures. Also because they did not allege any particular procedure was faulty. 153 P.3d at 724.
- ***Washington State Republican Party v. King County Division of Records*, 103 P.3d 725 (Wash. 2004) [Second Supreme Court review 12/22/04]**
 - ISSUE: decision to recanvass ballots previously rejected to see if their rejection was erroneous
 - County canvassing board wished to recanvass provisional ballots coded “no signature on file” because the ballots had only been checked against the electronic database, not the paper records, the old system of registration, and records at the Secretary of State. 103 P.3d at 725-26. Challenge under state recanvassing statute. *Id.*
 - RESULT: The ballots incompletely canvassed may be recanvassed pursuant to Washington law. 103 P.3d at 728.
 - RATIONALE:
 - The ballots were never fully canvassed (because the secondary signature checks against other sources were never done), and the Board can correct this error through recanvassing. 103 P.3d at 727-28. This type of error is what the recanvassing statute is designed for. *Id.*

APPENDIX D: PROVISIONAL BALLOT LITIGATION BY STATE

**Moritz College of Law
June 28, 2006**

024858

Arizona

- ***League of Latin American Citizens (LULAC) v. Arizona Secretary of State Jan Brewer***
 - ISSUE: wrong precinct
 - Lawsuit claims Arizona state policy to not count provisional ballots that were cast in the wrong precinct violates HAVA and the Equal Protection Clause of the 14th Amendment. Electionline.org – Litigation Summary (Feb. 14, 2005), <http://www.electionline.org/Portals/1/Publications/litigation.update.Feb.14.05.pdf>.
 - RESULT: N/A
 - RATIONALE: N/A

Colorado

- ***Colorado Common Cause v. Donetta Davidson*, No. 04CV7709, 2004 WL 2360485 (Colo. Dist. Ct. Oct. 18, 2004)**
 - ISSUE: wrong precinct; absentee voters getting provisional ballots
 - Lawsuit challenges a state guideline that prohibits anyone voting in the wrong precinct from casting a ballot in any race but the presidential election based on HAVA and the Constitution (fundamental rights challenge). 2004 WL 2360485, at *1.
 - Challenges state guideline that provisional ballots will not be counted if the voter applied for an absentee ballot based on HAVA and the Constitution (fundamental rights challenge). 2004 WL 2360485, at *1.
 - RESULT: votes cast in the wrong precinct may only count for president and vice president; provisional votes cast by voters who applied for absentee ballots must be counted.
 - RATIONALE:
 - Court felt that Congress had no intent to eliminate precinct-based voting, a constitutional form of organizing voting; therefore, votes cast in the wrong precinct may not be counted for county-wide issues. 2004 WL 2360485, at *11. Court also felt that the legislative history behind HAVA's passage supported this notion. *Id.*
 - Court felt that requiring voters to vote in the correct precinct is not an unconstitutional infringement on the right to vote. 2004 WL 2360485, at *14. The impact of the requirement is further lessened by the fact that poll workers will direct the voter to the correct precinct. *Id.* In addition, the Court felt that there was a compelling interest in preventing voter fraud furthered by the precinct system. *Id.*
 - The Court left the door open to the possibility that state-wide voting may be possible after a state-wide computerized database is established in 2006. *Id.*
 - Court felt that not allowing voters who requested an absentee ballot to vote provisionally would conflict with the purpose of HAVA to ensure that registered and eligible voters are allowed to vote provisionally. 2004 WL 2360485, at *11, 12.

Florida

- ***AFL-CIO v. Hood*, 885 So. 2d 373 (Fla. 2004)**
 - ISSUE: wrong precinct
 - Lawsuit claimed that the precinct system was an unnecessary and unconstitutional infringement on the right to vote under the Florida and U.S. Constitutions. 885 So.2d at 374.
 - RESULT: votes cast in the wrong precinct may be rejected and not counted.
 - RATIONALE: Precinct based system is a regulation of the voting process not a qualification placed on the voter and could have been reasonably deemed necessary to protect the integrity of the voting process. 885 So.2d at 376.
- ***The Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073 (N.D. Fla. 2004)**
 - ISSUE: wrong precinct
 - Right to provisional ballot if in the wrong precinct (conceded by Florida prior to Order Granting Preliminary Injunction)
 - Right for vote to be counted if cast in the wrong precinct based on interpretation of HAVA language.
 - 342 F. Supp. 2d at 1074.
 - RESULT: voters in the wrong precinct are entitled to a provisional ballot, but are not entitled to have that vote counted if cast in the wrong precinct. 342 F. Supp. 2d at 1083.
 - RATIONALE:
 - Reading the statute to mean that a voter must be eligible at that polling place is consistent with HAVA's purpose, to allow voters to vote when they appear at the polling place, not to eliminate precinct voting. 342 F. Supp. 2d at 1079.
 - Reading is also consistent with votes being counted "in accordance with State law." 342 F. Supp. 2d at 1080.
 - Reading consistent with legislative history which says that poll workers should direct voters to the correct precinct not allow voters to vote at any polling site. 342 F. Supp. 2d at 1080.
 - "Eligible" in HAVA language means registered, 18 years of age, has lived in State for at least 30 days. 342 F. Supp. 2d at 1080.
 - HAVA intended to safeguard voter's right to vote but allow state law to determine whether that vote counts. 342 F. Supp. 2d at 1080.
 - Because election workers may make mistakes with on-the-spot determinations of the voter's polling place, a voter may not be denied a provisional ballot because an election official determined that he/she is at the wrong polling place. 342 F. Supp. 2d at 1081.

Iowa

- ***Dean Brooks et al. v. Attorney General Tom Miller***
 - ISSUE: wrong precinct
 - Challenge Attorney General decision that votes cast in the correct county but wrong precinct should be counted for Congress and President and Vice President only. Electionline.org – Litigation

Summary (Feb. 14, 2005), <http://www.electionline.org/Portals/1/Publications/litigation.update.Feb.14.05.pdf>.

- RESULT: N/A
- RATIONALE: N/A

Michigan

- ***Bay County Democratic Party, et al v. Land et al*, 347 F. Supp. 2d 404 (E.D. Mich. 2004)**
 - ISSUE: wrong precinct; identification requirement for ballot to count
 - Lawsuit challenges Secretary of State's directive that votes cast in the wrong precinct but correct township, city, or village should not be counted based on HAVA. 347 F. Supp. 2d at 427-34.
 - Lawsuit challenges Secretary of State's directive that first time voters should be required to provide identification within six days of election day in order for their votes to count under HAVA, the Fourteenth Amendment to the Constitution, Michigan election law, and the Equal Protection Clause of the Michigan Constitution. 347 F. Supp. 2d at 434-35.
 - RESULT [but later overruled by Sixth Circuit]: votes cast in the wrong precinct but correct city, village, or township should be counted; identification may be required of provisional voters after the election in order for their votes to count. 347 F. Supp. 2d at 438.
 - RATIONALE:
 - With regard to the wrong precinct issue, the Court relies on the District Court decision in *Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975, 992-93 (N.D. Ohio 2004). *Bay County*, 347 F. Supp. 2d at 431-32.
 - The Court also relies on the "plain language" of HAVA – votes are to be counted in accordance with state law (dictates the *procedure* of counting); whether or not votes are counted is decided under HAVA; votes under HAVA are counted if the voter is "eligible" to vote. 347 F. Supp. 2d at 431-32.
 - With regard to the identification requirement, the Court found that the requirement was reasonable; that preventing voter fraud is a compelling interest; and that the requirement is applied uniformly and in a nondiscriminatory manner. 347 F. Supp. 2d at 435.
 - **OVERRULED**: 6th Circuit ruled that votes in the wrong precinct should not be counted and interpreted "jurisdiction," "eligible," and the HAVA provision concerning provisional ballots differently. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004).

Missouri

- ***Claude Hawkins, Brian Morahan, Susan Schilling and the Missouri Democratic Party v. Matt Blunt***
U.S. District Court Western District of Missouri, Case No. 2:04-cv-04177
 - ISSUE: wrong precinct
 - Plaintiffs claim that not counting provisional votes cast in the wrong precinct is in violation of HAVA (preemption argument). Order

denying Plaintiffs' Motion for Summary Judgment, granting Defendants' Motion for Summary Judgment 3.

- But the Secretary of State later decided to count those provisional ballots in which the voter was not directed to the correct polling place, so this issue was considered moot. Order 11.
- Plaintiffs also disputed a provision of Missouri law which states that a voter should be directed to the correct polling place in lieu of receiving a provisional ballot. Order 10, 12. The provision has been interpreted to mean that if a voter refuses to go to the correct polling place, he shall be given a provisional ballot, which will not be counted (allege it is inconsistent with HAVA - preemption). Order 10, 12.
 - Allege that the Missouri law implementing HAVA "frustrates the intent" of HAVA. Order 13.
- Plaintiffs also allege that the Missouri law violates the Equal Protection Clause because the decision not to count ballots cast at an incorrect polling place is arbitrary. Order 21.
- RESULT: Provisional ballots cast in the wrong precinct should be thrown out provided that the voter was directed to correct precinct. Order.
- RATIONALE:
 - HAVA was intended to be flexible in the way in which states could implement it, evidenced by use of the phrase "eligible under state law to vote." Order 14.
 - This reference to state law gives states the power to define voter qualifications for provisional ballots including where they can be cast in order to be counted. *Id.*
 - Court relies on statements of Sen. Bond and other HAVA supporters, stating that they did not intend to overturn State law regarding the jurisdiction in which a ballot must be cast and that poll workers should direct the voter to the correct polling place in the event of confusion. Order 15-16.
 - The laws do not violate the Equal Protection Clause because the goals and objectives of the precinct system are legitimate, and it guarantees those eligible to vote may do so. Order 22. The system is rationally related to ensuring a fair election. *Id.*

New York

- ***Panio v. Sunderland*, 4 N.Y.3d 123, 824 N.E.2d 488 (N.Y. 2005)**
 - ISSUES: wrong precinct; voters who voted provisionally because other voters had signed poll ledger in their place; provisional ballots in which the envelope did not identify the election district of the voter
 - Claims all based on N.Y. election law – once case got to Supreme Court, no claims based on Constitution or HAVA.
 - RESULT:

- Provisional votes in which the voter was in the correct polling place, but wrong district should be counted; voters in the wrong polling place and wrong district should not be counted. 4 N.Y. 3d at 128.
- Provisional ballots cast by voters who claimed that another voter voted in his/her place and signed the precinct ledger should not be counted. 4 N.Y. 3d at 129.
- Provisional ballots in which the election district was not identified on the envelope should be counted. 4 N.Y. 3d at 129.
- RATIONALE: provisional ballots should be counted if the ballots were in dispute only as a result of ministerial errors by the election board. 4 N.Y. 3d at 129.
 - Ballots cast in the correct polling place but wrong district were counted because they were assumed to be the result of ministerial error; the election officers should have directed the voter to the correct voting table. 4 N.Y. 3d at 128. Ballots cast in the wrong polling place and district were not counted because it would be unreasonable to require poll workers to ensure that voters are at the correct polling site. *Id.*
 - Provisional votes cast by voters who claimed another voter had voted in their place earlier were not counted because of the possibility of fraud. 4 N.Y. 3d at 129.
 - Provisional ballots lacking the election district on the envelope were counted because they were cast in the correct election district, and mishandling by election officials caused the ballots to become unidentifiable with a district (election officials placed post-it notes on the ballots containing the missing information, but the notes later fell off). 4 N.Y. 3d at 129.
- DISPOSITION: application for rehearing denied – 2/7/05

North Carolina

- ***James v. Bartlet*, 607 S.E. 2d 638, 359 N.C. 260 (N.C. 2005)**
 - ISSUE: wrong precinct
 - Whether or not ballots cast outside the voter's home precinct should be counted as long as the voter casts a ballot for races in his home precinct. 607 S.E. 2d at 640.
 - RESULT: NC state law requires voters to vote in the correct precinct; therefore, votes cast in the wrong precinct were not counted for state and local elections (did not discuss federal elections). 607 S.E. 2d at 645.
 - RATIONALE:
 - Plain language of state statute requires that the voter be a resident of the precinct he votes in and registers in (refers to "the precinct" versus "a precinct"). 607 S.E. 2d at 642.
 - No intent to enable voters to vote outside their precincts by Congress or state legislature in enacting provisional ballot statutes. 607 S.E. 2d at 643.

- Administrative Code sets out precise circumstances under which a voter may vote a provisional ballot and specifies that the voter must reside in the precinct. 607 S.E. 2d at 643.
- Court may not remedy Election Board's decision to give provisional ballots to voters in a manner not authorized by State law. 607 S.E. 2d at 644.
- Advantages of the precinct system: caps number of voters at one polling place; allows there to be one uniform ballot for all voters at that polling place; ballots may list only those elections a voter may vote for (less confusing); easier to monitor fraud; and it puts polling places closer to people's homes. 607 S.E. 2d at 644-45.

Ohio

- *Citizens Alliance for Secure Elections v. Michael Vu*
U.S. District Court for the Northern District of Ohio, Case No. 1:04CV2147
 - ISSUE: whether voters who have moved but not updated their registration should receive a provisional ballot or a regular ballot; whether voters inadvertently left off registration rolls should receive a regular or provisional ballot.
 - Plaintiffs claim that voters who have moved within the state but not updated their registration should not have to vote a provisional ballot at their new voting location but should instead vote a regular ballot. (Challenge guideline as in conflict with Ohio statute). Order Denying Plaintiffs' Motion for Temporary Restraining Order 2.
 - Claim that Board of Elections violated the NVRA when they failed to properly process voter registration applications and properly notify applicants of the status of their incomplete (yet timely) applications. Motion for a Temporary Restraining Order, Memorandum in Support 2-3.
 - Allege clerical errors were made in transcribing registration cards to computer records, which resulted in applications being considered incomplete (and thus, will force those voters to vote a provisional ballot rather than a regular ballot).
 - Allege that Board neglected to register voters whose applications were timely submitted.
 - Claim that the Board of Elections actions concerning these "incomplete" and lost registrations disenfranchise voters in violation of the Voting Rights Act. Motion Memorandum in Support 7.
 - RESULT: Provisional ballot procedure is sufficient to allow voters who were inadvertently removed from the registration list or should be on the registration list an opportunity to vote – so voters who have moved or were erroneously left off the list are permitted to vote provisionally.
 - RATIONALE: Provisional voting system seems reasonably calculated to remedy any situation in which a voter was left off the registered voter lists. Order 4.

- Plaintiffs dismissed their case without prejudice after their request for a temporary restraining order was rejected. Plaintiff's Notice Of Voluntary Dismissal Without Prejudice.
- ***The League of Women Voters of Ohio et al v. Blackwell*, 340 F. Supp. 2d 823 (N.D. Ohio 2004)**
 - ISSUES: wrong precinct & identification requirement for ballot to count
 - Wrong precinct issue. 340 F. Supp. 2d at 824.
 - Whether identification provided on election day should be required of provisional voters (voting provisionally because of ID requirement) in order for ballot to count. 340 F. Supp. 2d at 828.
 - Claim that it will cause provisional ballots voted by voters without identification (who cannot remember their numerical identifier, do not have a numerical identifier, or cannot return to the polls prior to closing) to be rejected.
 - Fourteenth Amendment fundamental rights claim.
 - Claim under HAVA based on interpretation of the "eligible" language.
 - RESULT:
 - Wrong precinct issue decided already in *Sandusky County Democratic Party*, and even though it was on appeal at the time of the decision, the Judge decided that the relief granted (or not) from that case would be sufficient to serve the interests of these plaintiffs as well (he did not reach a decision on the issue). 340 F. Supp. 2d at 824.
 - Identification or oral recitation of identification number (DL or SS) may be required before the polls close in order for a provisional ballot to count. 340 F. Supp. 2d at 831.
 - RATIONALE:
 - Identification may be required to preserve the integrity of elections and prevent voter fraud, which outweighs the interest in ensuring that every ballot count. 340 F. Supp. 2d at 829. Further, there is no less burdensome way to detect and prevent election fraud. *Id.*
 - Identification may be required because HAVA allows it; the requirement affects a small number of voters (registered by mail, voting for the first time, have no identification, cannot recite a numerical identifier); it is easy to obtain the identification information (telephone, quick return home); and notice is given of the requirement on the registration form. 340 F. Supp. 2d at 830.
 - Identification may be required because HAVA's language about "eligible under State law to vote" only means that the name on the registration form is eligible to vote. 340 F. Supp. 2d at 831. A voter must still prove that he/she is the same person as the person on the registration form, who is "eligible" to vote under State law, and proving identity is a reasonable burden. *Id.*
- ***Sandusky County Democratic Party v. Blackwell*, 339 F. Supp. 2d 975 (N.D. Ohio 2004)** – Order in District Court case, 10/14/04

***Sandusky County Democratic Party v. Blackwell*, 340 F. Supp. 2d 815 (N.D. Ohio 2004)** – Order in District Court case, 10/20/04

***Sandusky County Democratic Party v. Blackwell*, 386 F.3d 815 (6th Cir. 2004)**. – Order in Sixth Circuit case, 10/23/04

***Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004)** – Opinion in Sixth Circuit case, 10/23/04

***Sandusky County Democratic Party v. Blackwell*, 361 F. Supp. 2d 688 (6th Cir. 2005)** – Opinion in District Court in Plaintiff's request for attorney's fees, which was granted, 3/3/05

- ISSUE: wrong precinct
 - Plaintiffs claim that a Directive by the Secretary of State denies provisional ballots to voters inadvertently purged from voter lists or to those who go to the wrong precinct and only allows provisional ballots to voters who have moved and not updated their registration. Complaint 2-3.
 - Claim that this violates the purpose of HAVA – to ensure that all electors are eligible to vote provisionally. 339 F. Supp. 2d 975.
 - Claim that “jurisdiction” means the same as the geographic unit which maintains voter registration rolls and the same as its meaning in the NVRA. 387 F.3d at 574-75.
 - Statutory claim that HAVA provides an absolute right to cast a provisional ballot which counts provided that the voter is registered and eligible. Complaint 6-7.
 - Provisional ballots should be given to every voter who attempts to vote in the correct county but not necessarily the correct precinct. Complaint 10-11.
 - Claim that a voter (who has moved) who goes to one polling place attempting to vote and then goes to the other later should be allowed a provisional ballot. Complaint 12, 14.
- RESULT: Votes cast in the wrong precinct may not be counted by a state, but voters must be permitted to cast them. 386 F.3d at 816. HAVA secures the right to cast a provisional ballot; the legality of the ballot must be determined under state law. 386 F.3d at 576.
- RATIONALE:
 - Precinct system rooted in tradition; no indication Congress wished to completely overhaul the voting system of most states. 387 F.3d at 568; 387 F.3d at 576.
 - Advantages of precinct system: caps the number of voters at one place; allows ballot for all voters at one precinct to be the same for all elections; ballot lists only elections the voter may vote for (less confusing); easier to monitor and prevent fraud; and puts polling places closer to voter's homes. 387 F.3d at 569.
 - Court believes that the totality of the legislative history supports the notion that jurisdiction equals precinct, and votes cast outside the

voter's precinct should not be counted under HAVA. 387 F.3d at 575.

- The District Court's broad reading of "eligible under state law to vote" leads to the conclusion that a voter could vote multiple times in one election, and all of the provisional ballots would count if state law is not used to determine eligibility (since it is Ohio not federal law that specifies that a voter can vote only once).
- Court relies on the presumption that Congress must be clear in order to alter the state-federal balance; thus, Congress would have been more clear if it intended to eliminate state control over polling location. 387 F.3d at 578.
- But a provisional ballot must be provided to a voter, as HAVA's purpose was to prevent on-the-spot denials of ballots to voters determined ineligible by precinct workers. 387 F.3d at 574.
 - Court believes that HAVA's provisional voting was designed to compensate for the impossibility of having election officials with "perfect knowledge." 387 F.3d at 570. Under this rationale, provisional voting is used when a voter's eligibility in that precinct cannot be verified, but the voter insists that he/she is eligible because it is possible that the election officials do not have perfect information. *Id.*

- ***Schering v. Blackwell***

U.S. District Court for the Southern District of Ohio, Case No. 1:04-cv-755.

- ISSUE: equal protection issue
 - Plaintiffs allege that the process for evaluating provisional ballots in Ohio violates the Equal Protection Clause; want uniform standards for evaluating provisional ballots
- RESULT: Plaintiffs filed a stipulated dismissal. 3/15/05
- Case never reached opinion.
- ***State of Ohio ex rel. Mackey et al v. Blackwell et al*, No. 85597, 2004 WL 2973976 (Ohio App. 8 Dist. Dec. 22, 2004)**
 - ISSUES: equal protection issue & wrong precinct issue & how verification (against registration records) procedure should be conducted
 - Equal protection issue from different treatment on whether a voter should have a provisional ballot and different treatment on whether a provisional vote should be counted.
 - Claim that there were inconsistent standards for determining whether or not a voter received a provisional ballot in violation of the Equal Protection Clause. Original Action in Mandamus 2.
 - Claim that there were inconsistent standards for determining whether or not to count a provisional ballot in violation of the Equal Protection Clause. Original Action in Mandamus 2, 9.
 - Claim that votes cast in the wrong precinct should be counted given that many voters did not receive assistance to correct precinct, as

required by Secretary of State's directive. Original Action in Mandamus 3, 16-17.

- Claim that provisional ballots lacking a signature, HAVA sticker, or other required information on the envelope were wrongfully rejected – allege that these are nonmaterial errors in violation of VRA. Original Action in Mandamus 6-7, 11, 14.
- Claim that provisional ballots should be verified by hand against registration records rather than only against computerized records. Original Action in Mandamus 12-13.
 - Allege that database was incomplete – some registration forms were not indexed and accessible to poll workers. *Id.*
 - Allege that registration forms were erroneously processed. *Id.*
- RESULT: Dismissed for failure to state a claim upon which relief can be granted. 2004 WL 2973976, at *2.
- ***White v. Blackwell, et al.***
U.S. District Court for the Northern District of Ohio, Case No. 3:04CV 7689.
 - ISSUE: absentee voters getting provisional ballots
 - Absentee voters who failed to receive absentee ballots in the mail who wish to vote provisionally at the polls under HAVA.
 - Claim under HAVA that the Secretary of State and Board of Elections interpreted HAVA incorrectly. Complaint 8.
 - RESULT: Anyone who shows up to the polls and asserts eligibility to vote shall be permitted to cast a provisional ballot, including those who previously requested an absentee ballot. Memorandum Opinion and Order 3-4.
 - RATIONALE: HAVA, as interpreted in *Sandusky County Democratic Party*, is clear, anyone who asserts eligibility to vote is able to receive a provisional ballot under HAVA. Memorandum Opinion 3-4.

Washington

- ***Borders v. King County***
Superior Court, Chelan County, No. 05-2-00027-3 [election contest filed 1/7/05 contesting the certification of the results of the election, decision 6/6/05]
 - ISSUES: provisional ballots incorrectly tabulated with regular ballots before being verified; verification for provisional ballots; provisional ballots without labels. Court's Oral Decision 6/6.
 - Provisional ballots cast directly into electronic voting machine or ballot tabulated before it was verified. Court's Oral Decision 6/6.
 - No signature or registration verification conducted for certain provisional ballots. Court's Oral Decision 6/6.
 - RESULT: election not overturned – even though illegal votes cast – no proof who they were cast for or whether the voter voted in the particular race at all. Court's Oral Decision 6/6.
 - RATIONALE:
 - Cannot prove whether a voter voted for a particular race; do not know which ballots were illegal. Court's Oral Decision 6/6.
 - No evidence of actual ballot stuffing. Court's Oral Decision 6/6.

- Reconciliation issues and irregularities are common in elections. Court's Oral Decision 6/6.
- No evidence the irregularities were intentional. Court's Oral Decision 6/6.
- Probability techniques (proportional deduction) used to predict who an illegal voter voted for are not generally accepted scientific techniques. Court's Oral Decision 6/6.
- Judicial restraint from interfering with elections. Court's Oral Decision 6/6.
- Precedent – challenge under a WA statute, which previously had been interpreted to require direct or indirect wrongdoing by someone intending for the irregularity to help one candidate. Court's Oral Decision 6/6.
- ***McDonald, et al v. Secretary of State, 103 P.3d 722 (Wash. 2004)*** [First Supreme Court review 12/14/04]
 - ISSUE: signature comparison; request for canvassing of previously rejected ballots
 - Equal Protection Clause claim based on a disparity between signature-checking standards. 153 P.3d at 724.
 - Procedure for comparing signatures used in first canvass did not comport with Washington's statutory and regulatory scheme. 153 P.3d at 724.
 - RESULT: signature verification procedure in first canvass ok; no equal protection violation based on disparity between rejected provisional ballots; ballots may only be retabulated if they were counted or tallied in the previous count.
 - RATIONALE:
 - Signature verification procedure used in first canvass was sufficient, as voters were permitted to correct or update signatures until the day prior to the canvass (Nov. 16). 153 P.3d at 724.
 - No equal protection violation, as the petitioners only established a disparity in ballots rejected, not actual disparity in procedures. Also because they did not allege any particular procedure was faulty. 153 P.3d at 724.
- ***Washington State Democratic Party v. King County Records, Elections & Licensing Services Division***
Superior Court, King County, 04-2-36048-0 SEA [Decision 11/16/04]
 - ISSUE: verifying ballots/disclosure of voters in risk of rejection for signature problems
 - King County elections officials ordered to give the State Democratic Party the names of 929 voters whose provisional ballots may be discarded because of signature problems. Memorandum Opinion 2.
 - Challenge under Public Disclosure Act. Memorandum Opinion 2-3.
 - County argued that HAVA prevented disclosure. *Id.*

- Challenge under Equal Protection Clause. Memorandum Opinion 4.
 - Republican Party intervened and wanted provisional votes submitted by third parties (such as the Democratic Party) to be rejected, requiring voters to come down to the county board to verify their questioned signature. Memorandum Opinion 5.
 - RESULT: Democrats were entitled to disclosure of the names so that the voters could be contacted to verify their ballots; equal protection claim dismissed. Votes brought in by third parties should be counted.
 - RATIONALE:
 - Identity of voter or disposition of provisional ballots, but not votes cast, are subject to Public Disclosure Act. Memorandum Opinion 4.
 - Disclosure of voters' names leads to greater notice, which is the goal. Memorandum Opinion 4.
 - Equal protection claim – dispute is premature, and the evidence is hypothetical. Memorandum Opinion 4.
 - There is no evidence of fraud, no showing that King County is acting illegally, best protection against fraud is public disclosure, so Republicans' claim is dismissed. Memorandum Opinion 6.
- ***Washington State Republican Party v. King County Division of Records*, 103 P.3d 725 (Wash. 2004) [Second Supreme Court review 12/22/04]**
 - ISSUE: decision to recanvass ballots previously rejected to see if their rejection was erroneous
 - County canvassing board wished to recanvass provisional ballots coded “no signature on file” because the ballots had only been checked against the electronic database, not the paper records, the old system of registration, and records at the Secretary of State. 103 P.3d at 725-26. Challenge under state recanvassing statute. *Id.*
 - RESULT: The ballots incompletely canvassed may be recanvassed pursuant to Washington law. 103 P.3d at 728.
 - RATIONALE:
 - The ballots were never fully canvassed (because the secondary signature checks against other sources were never done), and the Board can correct this error through recanvassing. 103 P.3d at 727-28. This type of error is what the recanvassing statute is designed for. *Id.*

APPENDIX E: STATE SUMMARIES

June 28, 2006

024871

Alabama

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
6560	1836	28	0.10

All data in the tables are drawn from information in the Election Day Survey, Chapter 6, and the Electionline document "Election Reform Briefing 10: Solution or Problem? Provisional Ballots in 2004."

This was the first general election in which Alabama allowed full provisional ballots to be cast, switching from a previous affidavit ballot system that had allowed voters whose names were not on the rolls to cast a ballot if they signed an affidavit to verify their identity and registration status. The number of ballots cast was unusually low for a state without a statewide voter registration database. The percentage counted put Alabama in the bottom quarter of the country. It did not count ballots cast outside the correct precinct. Ballots were verified by county election boards that checked the registration and address reported on the provisional ballot.

The percent counted in the general election was much lower than in the primary elections held earlier in the year, in which about half of the provisional ballots were counted. The general election also had more than 6 times as many provisional ballots cast as the primaries. Provisional ballots were supposed to be distributed if the voter had applied for an absentee ballot but not received it, lacked valid ID (not photo ID necessarily), was not on the registration rolls, or was challenged by a poll watcher.

The percentage of provisional ballots counted was lower in urban counties, such as Jefferson County (Birmingham), than in rural counties. Areas with the greatest concentration of African-American voters were less likely than other areas to have provisional ballots counted.¹ Problems with access to provisional ballots were concentrated in Birmingham and Montgomery, affecting blacks and students most severely.² The cause of these problems seems to have been that newly registered voters were not always listed on the current rolls.

The only outcome that appears to have depended on provisional ballots was the vote on proposed Amendment 2. This effort to strike segregation-era provisions from the state constitution failed, by a margin smaller than the number of provisional ballots.³ If a higher percentage of provisional ballots had been counted, the likelihood of the amendment's passage would have increased dramatically.

Election officials received specific training in how to handle and count provisional ballots.⁴ Whether this training will be provided regularly in the future remains to be determined. Alabama had a very efficient system whereby voters could see if their vote counted, using a toll-free number that has results within 10 days, much faster than in most other states. But this notification system is based solely on policy and depends heavily on efficient county officials; it has no legal backing to make sure that it continues in other elections.

¹ Birmingham News (Alabama), November 13, 2004 Saturday, LOCAL NEWS; Pg. 11A, "JEFFCO ELECTION OFFICIALS REJECT 84% OF PROVISIONAL BALLOTS"

² See <http://www.flev.com/alabama.html>

³ The Associated Press State & Local Wire, November 5, 2004, "Provisional count next week could determine Amendment 2"

⁴ Birmingham News (Alabama), October 24, 2004 Sunday, NEWS, 388 words, METRO BRIEFS

Alaska

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
23275	22498	97.00	7.20

Elections in Alaska allow what are called "questioned ballots," similar to the provisional ballots mandated by HAVA. This practice is not new, giving Alaska an experience different from other states that are new to fail-safe forms of voting. Alaska led the nation in provisional balloting in two different ways: It had the highest percentage of provisional ballots cast, as those ballots accounted for 7.2% of the total votes in the state. Provisional ballots were counted at the highest rate in the country, 97% of those cast. This is nearly 30 percent higher than the national average of 68%. Alaska probably had such a high percentage of provisional ballots cast because it has a fairly strict ID regime. It requires all voters to show one of the HAVA-approved forms of identification, at the polling place in order to cast a regular ballot. The application of ID requirements to all voters means that those without ID will boost the number of provisional ballots cast by properly registered voters who failed to bring their ID with them. This ID requirement can be waived if the polling place workers know the voter.

Provisional ballots are available to a wide range of individuals. Anyone without ID can cast a provisional ballot, even if the voter is not in the proper precinct. These ballots are sent to a bipartisan review board that determines if the voter was registered in the state and if the signature on the ballot matches the signature on record. After the review board verifies the ballots, the Elections Division informs the voter if the vote counted by a hotline within 30 days of the election and by letter within 60 days. (This notification system will change by the 2006 midterm elections, when a website will be used to inform voters if their votes were counted.) Any vote cast within the correct jurisdiction, defined quite broadly in this state that lacks counties, is eligible to be counted. Nevertheless, the state made precinct verification possible through the Elections Division's website in an attempt to minimize the difficulty of having people vote outside their correct precinct. It also informed voters of ID requirements in an attempt to reduce questioned voting. Even outside the precinct, voter registration could still be verified through the state's voter registration database.

States with statewide registration databases might be expected to have recourse to fewer provisional ballots because the process of on-the-spot verification would be more efficient. In Alaska, this was not the case because the ID regime seems to trump the efficiency of a database. Provisional balloting attracted almost no media coverage inside the state, suggesting that the process lacked controversy. This is probably attributable either to the high percentage of votes counted or because provisional balloting was not new for the 2004 election.

Arizona

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
101536	73658	73.00	3.66

Arizona was fourth in the nation in provisional ballots cast, and, at 3.66%, third in the portion of its total vote. The state counted 73% of the provisional ballots cast, second highest among states with a statewide voter registration database and third highest among states that disqualified votes cast outside the correct precinct. The Number of provisional ballots is probably large because of its large Hispanic population. The Election Day Study found that "predominantly Hispanic jurisdiction had the highest rate of casting provisional ballots."⁵

Provisional ballots were given to voters whose names were not on the registration rolls at the polling location. They are later verified by confirming the voter's registration information and polling location as printed on the ballot envelope.

The state website disseminated little information about provisional voting, the state's ID requirements (not photo), or the location of precincts. Groups like the National Council of La Raza and the Mexican American Legal Defense and Education Fund informed Latino voters about provisional opportunities. The League of United Latin American Citizens sued after the election seeking to have votes cast in the incorrect precinct counted. It lost in U.S. District Court.⁶

The electoral system in Arizona is changing dramatically with the passage of Proposition 200, which modifies the state's voter ID laws. Passed in November 2004, it requires all voters to provide identification before voting. The Proposition did not exempt provisional ballots from this requirement. Provisional voters in the future will have to display ID in order to cast something less than a regular ballot.

The state Attorney General delayed implementing the law because he believed that it violated federal voting regulations like HAVA and the Voting Rights Act of 1965, under which certain Arizona counties receive greater scrutiny for failing part of the Section 4 formula that determines "covered jurisdictions" under Section 5.⁷ Nevertheless, the Department of Justice approved the bill's ID measures, saying that it did not violate the VRA by placing minority groups, 25.3% Latino, 5% American Indian, and 25.9% that speak a language other than English at home, in a worse position that they had been previous to its enactment, the so-called non-retrogression principle. The Governor vetoed a later bill to implement the law, saying that the bill violated HAVA's provisional ballot clauses. An agreement has finally been reached. It exempts Native Americans from the new ID requirements, but all other voters, including provisional voters, must produce ID.⁸

⁵ See Election Day Survey, Chapter 6, p. 10.

⁶ *League of United Latin American Citizens (LULAC) v. Arizona Secretary of State Jan Brewer*

⁷ The Section 4 Formula, as described by the US Department of Justice, http://www.usdoj.gov/crt/voting/sec_5/about.htm. "The first element in the formula was that the state or political subdivision of the state maintained on November 1, 1964, a "test or device," restricting the opportunity to register and vote. The second element of the formula would be satisfied if the Director of the Census determined that less than 50 percent of persons of voting age were registered to vote on November 1, 1964, or that less than 50 percent of persons of voting age voted in the presidential election of November 1964." Amendments since the original passage of the bill have updated the dates used to decide which jurisdictions receive stricter scrutiny.

⁸ <http://www.azcapitoltimes.com/main.asp?SectionID=2&SubSectionID=2&ArticleID=2423>

Arkansas

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
7675	3678	48.00	0.35

Arkansas had no statewide registration database, counted ballots cast outside the proper precinct, and was not new to provisional voting. The state's election website provided information about provisional balloting, but it did not describe the state's ID requirements (non-photo). Nor could voters verify their registration or find their proper polling place on the website.

The state's low percentage of ballots counted might suggest problems in the system. Pulaski County (Little Rock) is the state's most populous. Its supply of provisional ballots did not arrive until a short time before the election.⁹ The county then ran out of provisional ballots on Election Day.¹⁰ Similar problems of timing and resources affected other counties. Arkansas left notification about whether or not provisional votes counted up to the individual counties.

⁹ Pulaski County without provisional ballots, The Associated Press State & Local Wire, October 20, 2004, Wednesday, BC cycle, State and Regional, 570 words, By JAMES JEFFERSON, Associated Press Writer, LITTLE ROCK

¹⁰ Provisional ballots provide bump in otherwise smooth voting in state, Arkansas Democrat-Gazette (Little Rock), November 3, 2004 Wednesday, ARKANSAS, 1396 words, BY CHARLIE FRAGO ARKANSAS DEMOCRAT-GAZETTE

California

PB Cast	PB Counted	Percent Counted	Provisional Vote/Total Vote
66,408	491,765	74%	3.96%

California's provisional ballots made up approximately 1/3 of the total cast in the country. They accounted for 3.96% of the total votes cast in the state, second highest in the country behind Alaska. Its Percent Counted was 6% higher than the national average, which put in the top quarter of states without a statewide voter registration database.

Reliance on provisional ballots was heavy for several reasons.

- The registration deadline was only 15 days before the election (in previous years it had been 29 days). The short time between the close of registration and the election would have stretched the capacity of election officials to handle the paperwork and increased the number of voters left off registration rolls.¹¹ Since California lacks a statewide voter registration database, poll workers unable to verify registration would have to give out provisional ballots.
- The state counted votes cast outside the correct precinct, likely increasing counting rates.
- The large Latino population was well-informed about the possibilities of provisional voting and took advantage of the opportunity.¹²
- Local poll workers received training at the county level.¹³ That the training process was overhauled after the election indicates that it may have proved insufficient. State officials have now created stricter standards for poll worker training.

Counties were responsible for notifying voters if their provisional votes were counted. The California elections website informed voters about the possibilities of provisional voting, a system that was not new in California, and helped voters verify their precinct location. Nevertheless, state law still required that provisional ballots cast in an incorrect precinct be counted so long as they were within the proper county.

The state had only minimal ID requirements, asking only for the HAVA-mandated identification for first-time voters who did not present it while registering, though this requirement was not spelled out on the state's elections website. Similarly, because of the lack of a registration database, voters were incapable of verifying their registration before going to the polls through a website.

Since the election, demands for election reform have been few (the state is consumed by the debate over redistricting). In San Diego there is an effort to tighten voter ID laws, a move initiated by the former mayor.¹⁴

¹¹ http://www.ss.ca.gov/elections/ror_102102.htm

¹² See Election Day Survey, Chapter 6, p. 10, which states that "predominantly Hispanic jurisdictions had the highest rate of casting provisional ballots."

¹³ <http://www.igs.berkeley.edu/library/htPollWorkerTraining.html>

¹⁴ Horn cites border fence in wide-ranging speech; State of N. County address pulls in 150, The San Diego Union-Tribune, March 4, 2005 Friday, ZONE; Pg. NC-3; NI-3, 327 words, Daniel J. Chacon, STAFF WRITER, VALLEY CENTER

Colorado

	PB	Percent	Provisional
PB Cast	Counted	Counted	Vote/Total Vote
51,477	39,163	76%	1.84%

The counting rate in Colorado ranks it fifth among states without a statewide registration database and places it solidly above the national average. Provisional ballots accounted for 1.84% of the total vote, in the top quarter nationwide.

Provisional ballots were open to voters who were not on the registration rolls. The lack of a registration database made it impossible to verify registration at the polling place. The provisional ballot was also open to first-time voters who lacked proper ID. Notification about ballot status was left up to individual counties.

Colorado used a new provisional balloting system in 2004, replacing an older system in which provisional ballots could be obtained under limited circumstances, essentially for voters who had recently moved. Colorado required provisional ballots be cast in the correct precinct. The state elections website provided information about provisional ballots and the state's ID requirements (non-photo), but did not help voters confirm their correct polling place. The website made a critical mistake about the state's ID requirements, presenting the registration ID requirements for first-time voters as stricter than they in fact were.¹⁵ Despite the accessibility of information, the election was fraught with uncertainty and suspicion.

A poll taken a week before the November election found that 46% of those surveyed considered voter fraud likely.¹⁶ One voter in five thought it likely his vote would not be counted. One in three thought she would be prevented from voting by legal technicalities. Contributing to this uncertainty were well-publicized reports that the official training manual for election judges had been released only one week before the election, after approximately half of all poll workers had been trained.¹⁷ This atmosphere of anxiety and suspicion led to discussion of election reform measures after the election. In fact, the system seems to have worked well in the November 2004 elections.¹⁸

¹⁵ STATE'S VOTER REGISTRATION FORM CONTAINS ERROR ON ID REQUEST, Rocky Mountain News (Denver, CO), October 2, 2004 Saturday Final Edition, NEWS; Pg. 18A, 276 words, Julie Poppen, Rocky Mountain News

¹⁶ MANY COLORADO VOTERS FEAR FRAUD; ELECTION CONFIDENCE SHAKY, POLL SHOWS, Rocky Mountain News (Denver, CO), November 1, 2004 Monday Final Edition, NEWS; Pg. 4A, 847 words, Charlie Brennan, © 2004, Rocky Mountain News

¹⁷ Poll judges confused about rules Some observers say the state's standards on voter IDs and provisional ballots are not being followed, The Denver Post, October 27, 2004 Wednesday, FINAL EDITION, A SECTION; Pg. A-07, 799 words, Susan Greene Denver Post Staff Writer

¹⁸ EDITORIAL Boost for election credibility, The Denver Post, June 12, 2005 Sunday, FINAL EDITION, PERSPECTIVE; Pg. E-06, 271 words

Connecticut

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
1573	498	32.00	0.03

Connecticut's low percentage of provisional votes counted puts it into the lower half of states with statewide registration databases. Provisional ballots accounted for a small percentage of the final vote, in the bottom third nationwide. The 2004 general election was Connecticut's first attempt at a provisional voting system. The state's website provided voters with information about the new system and also explained the state's ID requirement (non-photo).

Voters given provisional ballots are required to sign an affidavit that they are registered and are the person they are claiming to be. In this way, the Connecticut system resembles affidavit voting systems, formerly used in Alabama, Kentucky, Michigan, Mississippi, and Texas. Provisional ballots are given to voters whose names do not appear on registration rolls. If the provisional ballots are cast outside the correct precinct, they are not counted. The validation process involves acceptance of the affidavit's veracity by election officials after it is compared to state registration records. A toll-free phone can be used to determine if a ballot was counted.

Elections in Connecticut are centralized. Counties have no role and cities and towns are merely distributors of ballots. This system makes HAVA primarily relevant to the state government, while local administrators are not concerned with the federal legislation except as it is interpreted for them by state officials. Inconsistent application of procedures across jurisdictions is not an issue in Connecticut.

Delaware

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
384	24	6.00	0.01

Delaware was last in the country in percentage of provisional ballots counted and third lowest in the country in the number cast. Delaware's statewide registration database minimized the number of people who needed provisional ballots and it was accurate enough to increase the likelihood that those who did receive them were not actually registered. Delaware counted provisional ballots cast outside the correct precinct. The state's elections website provided information about provisional voting and helped voters find their precinct. It did not explain the state's ID requirements (non-photo) nor did it allow voters to verify registration, odd in a state with a statewide database.

The statewide voter registration database reduced the number of people who received provisional ballots because they were not of local rolls. Thus most of those who voted were, in fact, not actually registered. Their votes were not counted.

District of Columbia

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
11212	7977	71.00	3.51

The District counted a high percentage of provisional ballots cast, placing it third in the country among areas with voter registration databases. These ballots accounted for 3.51% of the total vote, fourth in the nation. D.C. counted provisional ballots cast outside the correct precinct.

Provisional ballots were distributed to voters not on the rolls, voters in the hospital, voters who could not get absentee ballots, and others who were similarly disadvantaged. The District had one of the most comprehensive elections websites in the country, with a wealth of information to help voters. The site spelled out provisional balloting, even though the system was not new in DC. It allowed voters to verify their registration, possible because of the registration database, and helped voters find their precincts. By combining all of this information in one place, it is no surprise that DC could have so many voters who were knowledgeable enough to obtain provisional ballots and fill them out in such a way as to avoid disqualification.

Ballots were evaluated verifying the registration information listed on the provisional ballot envelope. Voters could check the DC elections website to discover if their vote was counted.

Florida

	PB	Percent	Provisional
PB Cast	Counted	Counted	Vote/Total
27742	10017	36.00	0.13

Florida counted provisional ballots at the seventh lowest rate of states without a voter registration database. Among states that disqualified ballots cast in the wrong precinct, it was much closer to the median. The state's disqualification of votes cast in improper precincts came after a lengthy court battle over the definition of "jurisdiction."¹⁹ Its elections website informed voters of the state's photo ID requirement, but it did not provide information about provisional voting or give voters the ability to verify registration or locate the precinct in which they were required to vote.

Provisional ballots were given to first-time voters without ID, voters not on registration rolls, and challenged voters, a sizable demographic in this battleground state. The County Canvass Board of each county used signature matching to verify provisional ballots against registration records. Voters were then informed by these same boards as to the status of their provisional ballot, though how this was done varied from county to county.

Election reform efforts in Florida are inextricably tied up with views about the 2000 election. As questions about purge lists and voting machines dominated the headlines, those issues became critical in the passage of HAVA. At the same time, the provisional ballot system that did exist in Florida prior to HAVA attracted little attention as to why it did not serve as a fail-safe for registered voters whose name did not appear on the rolls. Florida experienced much litigation leading up to the 2004 election. This litigation, much more than legislation, shaped Florida's voting rules by delineating the counting principles that would apply across the state.²⁰ Among other rules, this litigation caused courts to rule that voters in an incorrect precinct were entitled to a provisional ballot, but they were not entitled to have it counted.²¹

¹⁹ http://www.sptimes.com/2004/10/19/State/High_court_clarifies_shtml

²⁰ Advocacy organizations continue to object to the resolution of this litigation. See www.aclu.org/Files/getFile.cfm?id=16802

²¹ See *The Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073 (N.D. Fla. 2004)

Georgia

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
12893	3839	30.00	0.12

Even though Georgia counted ballots cast outside the correct precinct, its number of provisional ballots counted is low. It has a voter registration database. Among similar states, Georgia's 30% counting rate is only slightly below the median, but it is next to last among states that count provisional ballots cast outside the correct precinct. Provisional ballots made up .12% of the total vote in Georgia, below the national median.

Georgia, a state using provisional ballots for the first time, counted provisional ballots by verifying the information given by voters on sworn affidavits signed at the polling precinct. Voters were then informed by county officials if their vote counted. The reliance on the counties increased the variety of notification procedures across the state. The state had an informative elections website, helping voters verify registration, locate precincts, and discover the states ID requirements (non-photo).

Despite little evidence of complaints about vote fraud in 2004, the state enacted tighter ID requirements. These new standards gave Georgia one of the highest ID barriers in the nation by requiring all voters to show government-issued photo ID in order to vote. This new law is now awaiting pre-clearance by the Department of Justice's Civil Rights Division.²² This clearance process is opposed by a variety of groups that represent minorities, including NAACP and MALDEF, individual rights groups like the ACLU, and labor unions, including the AFL-CIO.²³

²² Perdue signs ID bill; Justice Department will review matter, The Atlanta Journal-Constitution, April 23, 2005 Saturday, Home Edition, Pg. 1B, 701 words, SONJI JACOB, CARLOS CAMPOS

²³ Foes rip passage of voter ID bill, The Atlanta Journal-Constitution, April 1, 2005 Friday, Home Edition, Pg. 1D, 542 words, SONJI JACOBS, CARLOS CAMPOS

Hawaii

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
346	25	7.00	0.01

Hawaii's percent counted was second lowest in the nation. Provisional ballots accounted for .01% of the total vote in the state, also second lowest nationwide. Hawaii has a voter registration database. It did not count provisional ballots cast outside the correct precinct. Provisional balloting is new to Hawaii. Hawaii's elections website did not provide easily accessible information about provisional balloting, though it did explain the state's photo ID requirements and helped voters find their precinct.

Those who cast a provisional ballot in Hawaii were not on the rolls or were first-time voters that did not meet the HAVA ID requirements. These voters filled out an affidavit to attest to their identity and registration status. Officials then verified these affidavits with the state's registration database in order to see which votes should count. Voters could call a phone number to see if their vote counted. Only 25 were counted out of the 346 cast. Hawaii's database was effective in limiting the number of provisional ballots cast. One factor that surprisingly did not raise the percent counted in the state was the confluence of the ID requirement with provisional ballots. Though the state required photo ID from voters, those who lacked ID could vote provisionally, without the requirement to return later and show ID. In this situation, it appears that the success of the database in solving provisional ballot-inducing problems ahead of time trumps the state's leniency about voters returning later with the proper identification required to cast a regular ballot.

Illinois

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
43464	22167	51.00	0.42

Illinois' number of provisional ballots cast was just out of the top 10 nationwide. Illinois was a first-time provisional ballot state, it lacked a statewide voter registration database, and it counted provisional ballots cast outside the correct precinct. Verification standards that were easier to meet than those employed by many other states probably encouraged poll workers to be more helpful in passing out provisional ballots. The state's elections website also offered information about provisional ballots, and voters could visit the site to determine if their ballots had been counted.

Illinois used affidavits in the verification process, allowing vote counters to check the information about which the voter had sworn in order to count the vote. Voters could check a website to determine if their votes counted.

Illinois offers an instructive lesson in the relationship between ID requirements and allegations of fraud. East St. Louis has generated voting-related criminal conspiracy convictions, while Chicago remains plagued with accusations that the dead continue to be politically active.²⁴ Nevertheless, state ID requirements remain lax, only asking for HAVA requirements for first-time voters, requiring other voters to sign in. For a state lacking a registration database, the possibilities of multiple voting seem high. Provisional ballots have not been linked to fraud in Illinois; the relatively low percent counted makes them appear, at least on the surface, to be relatively secure.

²⁴ Voting problems alive, well in heart of Illinois, The Pantagraph (Bloomington, Illinois), January 11, 2005 Tuesday, EDITORIAL; Pg. A8, 346 words

Indiana

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
4029	598	15.00	0.02

Indiana lacked a statewide database and did not count ballots cast outside the correct precinct, which held down the verification rate. Provisional ballots are new to Indiana. The state's website provided little information for voters, especially about the state's new provisional voting system or the state's ID requirements.

Provisional ballots were given to those not on registration rolls or lacking ID. Also, those who lacked identification were required to return to the precinct later. The ballots of all those who did not return were disqualified automatically. After returning with ID, voters then had to have their registration verified, through comparison with local records. At this point, Indiana provisional voters were able to call a toll-free phone number in order to discover if their ballot had been counted. Since the election, the state has overhauled parts of its system related to voter identification, though the basic provisional ballot structure remains intact.

The state has adopted a requirement of photo ID.²⁵

²⁵ Daniels signs voter ID bill; ICLU plans lawsuit, The Associated Press State & Local Wire, April 28, 2005, Thursday, BC cycle, State and Regional, 350 words, INDIANAPOLIS

Iowa

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
15406	8038	52.00	0.53

Iowa's percent counted was near the median for states without a voter registration database and slightly above the median for states that disqualified ballots cast outside the correct precinct. Iowa enacted provisional voting before the passage of HAVA. The state's elections website provided information about provisional voting and ID requirements, but the lack of registration database made it impossible for voters to verify their registration or find their polling place online.

Provisional ballots were chiefly available to voters not on the registration rolls; though challenged voters, relatively common in this battleground state, also could vote provisionally. Provisional voters brought ID later in order for their ballots to count, if they were first-time voters who still needed to provide ID. They were then notified by mail if the ballot had been counted.

Iowa can be considered a fairly typical state, representative of most procedures and most outcomes nationally.

Kansas

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
45563	31805	70.00	2.68

Kansas' percent counted placed it fifth among states that did not count votes cast outside the correct precinct. It was also in the top ten among states that did not have a statewide voter registration database. Provisional ballots accounted for 2.68% of the final vote, sixth in the nation. All of the states with higher percentages were also states that previously had provisional systems.

Provisional ballots in Kansas were widely distributed, going to first-time voters without ID, those not on registration rolls, voters who recently moved or changed names, challenged voters, and others. Provisional voters in Kansas who lacked ID were required to return to the polling place later with proper identification. After the ballots had been tallied, counties contacted provisional voters in their own way; there was no unified notification system across the state. Given the wide distribution of provisional ballots to a range of voters who give all appearances of proper registration, it is not surprising that Kansas had so many provisional ballots, nor is it unusual that such a high percentage were part of the final tally.

On the whole, questions of ID and provisional voting attracted little attention in Kansas, and for that matter, most of the Midwest is unconcerned with the issue. The lack of close presidential races in states like Kansas, Nebraska, and Oklahoma is a possible explanation of this unconcern.

Kentucky

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
1494	221	15.00	0.01

Kentucky's percent counted and the percentage of the final vote accounted for by provisional ballots both ranked near the bottom in the nation, fifth and sixth lowest respectively. For Kentucky, provisional balloting is a slight switch, as the state shifted away from an affidavit voting system after HAVA. Also after HAVA, the state created a statewide voter registration database. It chose not to count provisional ballots cast outside the correct precinct. The state's election website allowed voters to determine where the correct precinct was, also allowing voters to verify registration and gain information about provisional voting procedures.

Provisional ballots only went to the HAVA-mandated primary target, voters not on registration rolls. The statewide registration database meant that these voters were likely never registered, and the process' results back that conclusion. The state still used affidavits in the verification process, making its provisional balloting system similar to what was previously in place. The state informed voters about the status of their provisional ballots through a website.

Louisiana

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
5971	2411	40.00	0.12

The low number of provisional ballots and the relatively low percentage counted places Louisiana toward the middle of states with a statewide voter registration database. Provisional ballots made up .12% of the final vote in the state, slightly below the national median. The state's elections website located precincts and gave information about provisional voting, but it did not describe the state's photo ID requirement.

Provisional ballots went to those not on the rolls and to first-time voters without ID. Officials later verified these voters' date-of-birth and address to determine identity and vote status. After the counting ended, voters could call a phone number to find out if their vote counted.

The Secretary of State predicted before the election that most provisional votes would not be counted.²⁶ The election in New Orleans was characterized as a "catastrophe."²⁷ Problems mostly centered around inoperable voting machines, but there were also charges that poll workers told all first-time voters had to vote provisionally. These charges were raised by Louisiana Association of Community Organizations for Reform Now, ACORN, and the Election Protection Coalition.

²⁶ McKeithen: most provisional ballots won't count, The Associated Press State & Local Wire, November 1, 2004, Monday, BC cycle, State and Regional, 644 words, By BRETT MARTEL, Associated Press Writer, NEW ORLEANS

²⁷ Nov. 2 N.O. election called 'catastrophe', New Orleans CityBusiness (New Orleans, LA), November 15, 2004 Monday, NEWS, 1091 words, Richard A. Webster

Maryland

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
48936	31860	65.00	1.33

The percent counted put the state almost exactly at the national average, though slightly below the average for states that had did not have registration databases and counted votes cast outside the correct precinct. Provisional balloting was not new to Maryland, further distinguishing it from the one-third of states that began the procedure in 2004. The state's elections website disseminated information about provisional voting and identification.

First-time voters without ID and those not on the rolls could vote provisionally. These voters were required to return later with ID for their vote to count. They could check the website or call a phone number to learn if their provisional ballot counted or not.

Massachusetts

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
10060	2319	23.00	0.08

The state had a voter registration database and did not count votes cast outside the correct precinct. 2004 was the state's first attempt at provisional balloting. The state's elections website provided information about provisional voting and gave voters the means to verify the location of precincts.

Massachusetts administers elections from the top-down. HAVA implementation is decided exclusively at the state level, removing counties completely from the process. This system is common throughout New England. Uniformly election administration increases consistency across the state. Provisional ballots went to voters whose names were not on registration rolls, though the database helped to limit the number somewhat. Provisional voters filled out an affidavit, whose information was later compared with the database. Voters could call a phone number to determine if their vote counted or not.

Massachusetts was one of the many states that did not have much public discussion about provisional voting.

Michigan

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
5610	3277	58.00	0.07

Michigan had the voter registration database that inspired the HAVA requirement, and it recently switched from affidavit balloting to provisional balloting in fail-safe situations. It did not count provisional ballots cast outside the correct precinct, surviving court challenges that sought to change the counting standards for the state.

Provisional voters were required to return to polling places later with ID and were notified by mail if their ballots counted or not. Michigan's system had two striking features, one of the nation's best databases and an outstanding website.

Michigan's voter registration database, known as the Qualified Voter File, was conceived in 1994, under Public Act 441, as an answer to the highly decentralized registration process in the state. Implemented in time for the 1998 midterm elections, the system was intended to serve five goals (as stated by Secretary of State Candice S. Miller):

- "The elimination of all duplicate voter registration records in the system.
- The streamlining of the state's voter registration cancellation process.
- The elimination of time-consuming record maintenance activities.
- The elimination of registration forwarding errors and duplicative tasks.
- Sizable cost gains on the local level."²⁸

For comparison, Louisiana, despite a much smaller population and a similar database, had 5,971 ballots cast. Because local officials can more easily and accurately determine voter registration, the number of provisional ballots cast is lowered instantly. This database served as the model for the HAVA requirement of databases in each state and was awarded by the CalTech/MIT Voting Technology Project as the Best Practice in Managing Voter Registration.²⁹

On September 5, 2002, Michigan unveiled its path-breaking Voter Information Center. This built upon previous efforts to create a statewide voter registration database, allowing the public to access voter registration information, precinct and polling locations, and other crucial election resources through a single source. By combining all of these features, the Michigan website allows voters to know that mail-in registration was received, to overcome the difficulties of locating the correct polling place, and to access information about races that are being decided in the election. Because of this central location for information, Michigan considers it acceptable to disqualify provisional ballots cast outside the correct precinct, assuming that voters should not have nearly as much difficulty determining their correct precinct as do those in other states.

²⁸ See Candice S. Miller. "The Qualified Voter File: A Brief Introduction." At <http://www.ncsl.org/programs/legman/elect/taskfc/appb.htm>.

²⁹ http://www.vote.caltech.edu/media/documents/july01/Best_Practices.pdf

Mississippi

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
25,975	Not Reported	Cannot be known	Cannot be known

Mississippi did not report its provisional vote totals. Though the state has had public and contentious debates about voter ID requirements,³⁰ its provisional voting has flown beneath the radar. There has been no vocal Republican-Democratic split on the issue, as has been true with ID, nor has there been a similar Governor-Legislature clash. Instead, provisional voting in Mississippi has gone unnoticed, and its non-reporting of vital statistics has drawn no press. Rather, the state stands as a large blank spot in national coverage of the issue, and until numbers allow some insight into the process' successes and failures, we are unable even to speculate about what really happened on Election Day in Mississippi.

³⁰ Special sessions appear to fuel dissension at Capitol; srb/stf/ew, The Associated Press State & Local Wire, November 22, 2004, Monday, BC cycle, State and Regional, 563 words, By SHELIA HARDWELL BYRD, Associated Press Writer

Missouri

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
8183	3292	40.00	0.12

Missouri did not have a statewide voter registration database, and it did not count provisional ballots cast in an incorrect precinct. It was using provisional ballots for the first time, complying with the newly established HAVA requirements. The state's election website provided information about provisional voting and voter ID requirements, though voters could not verify their registration status or easily locate their polling place.

Provisional ballots were given out to first-time voters who lacked ID (the state had a non-photo ID requirement) and to voters who were not on the registration rolls. After the provisional ballots had been cast, officials checked a voter's registration records to determine if the ballot should count. Voters could call a toll-free phone number to find out if his or her vote counted. Considering the state's percent counted, surprisingly low in a state without a database but in line with the correct precinct standard, most of the phone calls revealed that the ballot did not count in the final tally.

Accusations of vote fraud have lingered in Missouri – particularly concerning St. Louis - since the 2000 election, when several figures involved in the city's electoral administration were convicted of conspiracy to commit vote fraud.³¹ These problems have created calls for electoral reform, particularly from Republican officials in the state.

³¹ VOTER RIGHTS AND VOTER FRAUD, St. Louis Post-Dispatch (Missouri), May 24, 2002 Friday Five Star Lift Edition, EDITORIAL; Pg. C18.

Montana

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
653	357	55.00	Vote 0.08

Montana used provisional voting only lightly. The state did not have a voter registration database, nor did it count votes cast outside the correct precinct. The state was using provisional ballots for the first time. Its elections website gave voters information about the state's ID requirements, though it did not provide precinct locations, give a mechanism for verifying registration status, nor provide information about the new provisional voting system.

Provisional ballots are given to voters who are not on the registration rolls, are challenged, or chose not to vote absentee despite applying for the ballots. County officials then verify the voter's registration, and the voter must bring ID later. After the verification process, the state informed voters by mail if their provisional ballots counted or not.

Montana has recently shifted to an Election Day registration system. This change aligns Montana with Wisconsin, Wyoming, Idaho, Maine, New Hampshire, and Minnesota. These EDR states have different approaches to provisional balloting. Idaho, New Hampshire, and Minnesota are exempt completely under Section 302(a)(5) of HAVA, while the other three allow provisional voting under some narrow circumstances but are still basically exempt. The federal government has not yet indicated into which category Montana will fall.

Nebraska

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
17003	13298	78.00	1.71

Nebraska's provisional ballots made up an unusually high percentage of the final vote for a state that disqualified provisional ballots cast in an incorrect precinct. The state also lacked a voter registration database, which tends to increase the number of ballots cast provisionally. The current system replaced an earlier limited provisional ballot system. Its elections website provided little information for voters, especially about provisional voting and ID requirements and did not offer information to verify registration or determine precinct locations.

Provisional ballots went to those who were not on the registration rolls. The high percentage counted implies that a great number of registration errors had been made by elections officials in the state, especially since votes in the wrong precinct were automatically disqualified. The state requires provisional voters to complete an affidavit which is verified in order to determine if a vote should count. Voters can check the status of their votes through either a website or a phone number.

Nevada

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
6154	2447	40.00	0.29

Nevada was new to provisional balloting, having no similar system before HAVA. The state lacked a registration database and did not count votes cast outside the correct precinct. Its elections website did not give easy access to information about the new provisional voting system or about the state's ID requirements. Similarly, voters could not verify their registration nor locate their precinct.

Provisional votes went to first-time voters without ID and to those not on registration rolls. These voters filled out an affidavit in order to cast a provisional ballot. The affidavit was later verified to determine if the ballot should be counted. Voters could either call a phone number or check the state's website to find out if their vote counted.

Nevada has passed election reform measures since November 2004, trying to correct public perceptions of a flawed process.³² The state is trying to learn from its mistakes in its first attempt with provisional ballots. The new reforms hope to finish the creation of the HAVA-mandated database, decrease the number of provisional ballots via pre-emptive use of the database, and inject confidence into the counting process by clarifying verification procedures. The state has not emphasized questions of ballot security, arguing that the current system already did a good job sifting out those who were not actually registered. (In the case of Las Vegas, the problem was sorting out large numbers of out-of-state tourists who attempted to vote locally.)

³² Nevada committees take up election reform, The Associated Press State & Local Wire, May 5, 2005, Thursday, BC cycle, State and Regional, 636 words, By ELIZABETH WHITE, Associated Press Writer, CARSON CITY, Nev

New Jersey

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
64217	35485	55.26	Vote 1.96

The state was extending and revamping an earlier provisional system. It lacked a registration database and did not count ballots cast in an incorrect precinct. The state's elections website contained information on ID requirements and provisional voting, though it did not allow voters to verify registration or locate precincts.

Provisional ballots were given to first-time voters without ID and voters whose names were not on local registration rolls. Provisional voters brought ID later in order for their votes to count. After the counting process ended, voters could check a website or call a phone number in order to discover if their vote counted or not.

Complaints were reported in both Essex and Middlesex Counties, home to two of Rutgers University's campuses. Students argued that their registrations, completed in recent campus drives, had not been processed by elections officials in a timely manner, shunting many students to provisional ballots.³³ In response to these problems, some have called for Election Day Registration in New Jersey.³⁴ As of yet, EDR has not generated reform bills in the state legislature.

³³ <http://www.dailytargum.com/media/paper168/news/2004/11/19/Opinions/Importance.Of.Preparation-811402.shtml>

³⁴ Dr. Frank Askin. "Let 'Em In and Get 'Em In: How to Give More People the Right -and the Reason- to Vote." New Jersey Policy Perspective. http://www.njpp.org/rpt_askin.html

New Mexico

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
15360	8767	57.00	1.16

New Mexico's percentage of ballots cast provisionally places it in the top third in the nation. The state counted votes cast outside the correct precinct, after changing its previous policy following a suit brought by Latino civil rights groups, most prominently the Mexican American Legal Defense and Education Fund.³⁵ The state had a voter registration database and was following in a previous tradition of provisional balloting. New Mexico's elections website explained the state's ID requirements and how provisional balloting worked, emphasizing how open the possibility was to voters who lacked other options.

Provisional ballots were offered to voters left off registration rolls and to first-time voters who could not meet the HAVA ID requirement. Provisional voters were required to bring ID later in order to verify their ballots. Voters could then call a phone number to discover if their ballot counted or not.

Since the election, the state has passed an important election reform bill.³⁶ This new act tightens up the state's ID requirements, requiring voters to either present a driver's license, a bank statement, or recite their name, date of birth, and last four digits of their social security number. Opponents of the legislation argued that it did not go far enough to insure ballot security. Supporters responded that the measure was sufficient to guarantee the integrity of the ballot without denying access to those less likely to be able to produce photo identification. This bill was passed in response to complaints about the counting of provisional ballots after the election. By front-loading the ID process, state elections officials hope to avoid future complaints by preempting possibilities of later partisan manipulation.

³⁵ <http://www.maldef.org/news/press.cfm?ID=238>

³⁶ Gov. Signs Voting Standards Bill, Albuquerque Journal (New Mexico), April 7, 2005 Thursday, FINAL; Pg. C3, 424 words, Andy Lenderman Journal Politics Writer

New York

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
243450	98003	40.30	Vote 3.27

New Yorkers cast the second highest number of provisional ballots in the nation, though the percentage of the final vote only ranked fifth. The state did not have a voter registration database and did not count votes cast outside the correct precinct. New York was not new to provisional balloting, having had a fail-safe system before HAVA. The elections website provided little information to voters, especially about provisional voting possibilities and voter identification.

Provisional ballots went to first-time voters without ID, voters not on rolls, and those who had recently moved. These voters filled out affidavits that were later verified by elections officials. The verification rate was probably low because of the exclusion of votes cast in an incorrect precinct, a particular problem in New York City. With multiple polling places in a single large room, voting in an incorrect precinct was a common occurrence. The state website did not make it easy to verify precinct location. After the provisional votes were counted, voters received mail reporting if their provisional ballot counted.

New York's provisional ballots received extra attention in a state Senate race in Westchester County.³⁷ After months of litigation, the election was settled, but the attention to provisional ballots did not die away. Likely election reform to clarify verification rules and solve public outcry about the precinct requirement is imminent. Though proposals have not yet passed, New York is likely to change its election laws in response to the experience in 2004.

³⁷ Three months after Election Day, Spano is sworn in again as senator, The Associated Press State & Local Wire, February 9, 2005, Wednesday, BC cycle, State and Regional, 724 words, By JOEL STASHENKO, Associated Press Writer

North Carolina

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
77469	42348	55.00	Vote 1.21

The state lacked a voter registration database, but it did count votes cast outside the correct precinct. Of course, legal developments since the November election make the above facts and figures somewhat debatable because of arguments about rules for counting provisional ballots. As the state struggled with the issue of counting out-of-precinct provisional ballots, the number counted listed above is open to revision. The state's elections website allowed voters to verify registration and locate precincts, although it did not disseminate information about provisional ballots or identification requirements.

North Carolina's electoral system was the subject of a major suit about how provisional ballots should be counted. The state's Supreme Court argued that pre-Election Day law required ballots cast in incorrect precincts be disqualified, while the state legislature demurred. The suit arose because a race fell within the margin of provisional ballots cast, allowing questions to be raised that would otherwise have been ignored given a larger margin of victory. The race in question was for the position of State Superintendent of Schools, a race was finally decided in favor of Democratic candidate June Atkinson.³⁸ The state legislature took the position that eventually secured Atkinson's victory by counting provisional ballots cast in an incorrect precinct³⁹, while the state Supreme Court backed the disqualification of those ballots.⁴⁰ This debate over separation of powers, the integrity of the electoral process, and the independence of the courts, raises questions about how robust the North Carolina system is. Simply put, the November election has two sides in North Carolina, and neither can even agree on what happened, let alone how it should be interpreted. In a state where the counting of provisional ballots is widely reported to have varied from jurisdiction to jurisdiction, the resulting unequal and fraud-ridden election should not be any surprise.

³⁸ <http://www.nytimes.com/2005/08/24/national/24carolina.html?adxnnl=1&adxnnlx=1125328715-oGB1b2+9CWCrlhmQLv6F+Q>

³⁹ Fletcher shifts focus to Legislature in election dispute, The Associated Press State & Local Wire, May 11, 2005, Wednesday, BC cycle, State and Regional, 452 words, By GARY D. ROBERTSON, Associated Press Writer, RALEIGH, N.C.

⁴⁰ N.C. appeals court denies Fletcher stay in schools chief race, The Associated Press State & Local Wire, May 11, 2005, Wednesday, BC cycle, State and Regional, 358 words, By GARY D. ROBERTSON, Associated Press Writer, RALEIGH, N.C.

Ohio

PB Cast	PB Counted	Percent Counted	Provisional Vote/Total Vote
158,642	123,548	78%	2.2%

Ohio did not have a statewide voter registration database, and --after several court tests-- did not count ballots cast outside the voter's assigned precinct. The state adopted a new provisional voting system after the passage of HAVA to replace its previously limited provisional system. Its elections website provided information about provisional balloting and ID requirements, information circulated heavily by third-parties in get-out-the-vote efforts in this most contentious of battleground states.

Provisional ballots in Ohio went to voters whose names did not appear on registration rolls. These ballots were verified by county elections officials checking registration records to see if the voter was ever actually registered. Voters were able to call a phone number in order to determine if their ballots were counted.

The vote in Ohio was the subject of much litigation. Before the election, litigation challenged procedures for counting provisional ballots cast outside the correct precinct and the status of poll observers. Hanging over all of this was the lingering shadow of *Bush v. Gore* and its holding that states must have uniform counting procedures. In the critical case of *Sandusky County Democratic Party v. Blackwell*, a federal circuit court ruled that voters could cast a provisional ballot in an incorrect precinct, but the ballot did not have to be counted.⁴¹ The court heavily deferred to state prerogatives to determine what constituted an eligible ballot in that state. This provided the basis for the position already advocated by Secretary of State Kenneth Blackwell, the plaintiff, who opposed counting provisional ballots cast in an improper precinct. HE was also the subject of other controversy because of his close ties to the Bush campaign. Since the election, the League of Women Voters has filed a suit that seeks changes in the state's electoral machinery. As a result of the controversies and scrutiny in 2004, Ohio is likely to experience changes in its elections procedures, but the nature of those changes is still unclear.

Ohio was the target of accusations of vote fraud from the right and voter suppression from the left. The American Center for Voting Rights released a report alleging voter fraud in Cleveland and Columbus, the two most Democratic urban centers in the state.⁴² At the same time the Democratic Party released a report arguing that inequities in the distribution of voting machines and other problems put "democracy at risk."⁴³ Despite the allegations, the controversy has so far been limited to an exchange of charges and suspicions that has lacked conclusive evidence.

⁴¹ *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004)

⁴² <http://www.ac4vr.com/reports/072005/default.html>

⁴³ <http://a9.g.akamai.net/7/9/8082/v001/www.democrats.org/pdfs/ohvrireport/fullreport.pdf>

Oklahoma

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
2615	201	8.00	0.01

Oklahoma counted provisional ballots at the third lowest rate in the nation. These ballots constituted a low enough percentage of the final vote to place the state in the bottom ten nationally. Oklahoma has a voter registration database, and it did not count votes cast outside the correct precinct. The state was new to provisional balloting in 2004. The elections website provided information only about the state's ID requirements, not helping voters verify registration status, locate precincts, nor did it explain the details of the new system of provisional voting.

Provisional ballots were given to first-time voters without proper ID and people not on local registration rolls. The state's database helped keep the latter group to a minimum. After the ballots were cast, elections officials verified registration status using the database, and voters can call a phone number to learn if their ballot counted. The preemptive usage of the database probably means that most callers, because they were never really registered, would have discovered that their provisional ballots did not contribute to the final tally.

Oregon

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
8298	7077	85.00	0.39

Provisional votes were tallied at the second highest percentage in the nation. Oregon lacked a registration database, but it did count votes cast outside the correct precinct. The Oregon system continued its earlier versions of provisional voting.

Provisional ballots in Oregon are unusual because the state uses an all-mail voting system. Provisional ballots, then, are even more of an exception in the state than they are elsewhere. Laws in Oregon open provisional voting up widely, allowing first-time voters without ID, challenged voters, voters not on the rolls, voters who applied for absentee ballots, and others to vote provisionally. Voters must go to the county elections office in order to cast a provisional ballot. Verification involved a simple signature comparison between ballot envelopes and records. Voters learned by calling a phone number if their vote counted.

Oregon is an interesting example of provisional ballots in an uncommon electoral environment. With an all-mail voting system, the need for fail-safe forms of voting seems less likely; after all, voters are already able to avoid problems with finding the correct polling place and the ability to cast a ballot without being on a particular polling place's registration roll. But in the end, a state dependent on the mail, and the attendant problems of voters losing ballots, needs more than most a "fail-safe" outlet. Provisional voting in Oregon suffices to cover a great host of voting sins by allowing voters to correct their mistakes on Election Day.

Pennsylvania

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
53698	26092	49.00	Vote 0.45

The state had some failed attempts with a voter registration database that are discussed below, attempts that both increased the numbers of ballots cast provisionally while decreasing the number counted. The state did count votes cast outside the correct precinct. Pennsylvania, as its struggles with the implementation of HAVA made clear, was new to fail-safe voting after the passage of HAVA. The state's election website did provide information about the new system, and it provided information about the state's ID requirements, which were only the HAVA minimums.

Pennsylvania voters were given provisional votes if their names were not on registration rolls, though the state's database was supposed to fix this problem. Its failure in the election has led to broad calls for reform since the election, and it increased provisional vote totals in the state. It also probably decreased turnout in Philadelphia where the system had its biggest problems, making the entire voting process in the city slower than in other regions of the state. But nonetheless, if provisional voters were able to vote, officials would verify their registration by comparing the envelope's information with the state's database. Voters could call a phone number to find out if their vote counted.

Pennsylvania began its push toward a statewide voter registration database in 2001. In June 2001, the Statewide Uniform Registry of Electors (SURE) was passed in reaction to the Florida controversy of 2000. Pennsylvania had its own election problems in 2000, as its implementation of motor voter statutes confused voters while depressing registration and turnout. In January 2002, the new governor, Mark Schweiker, signed a law that specifically implemented the database portion of the earlier election reform package signed into law by Tom Ridge. On July 24, 2002, the Department of State awarded the contract to create the database to Accenture, Ltd., hoping to link registration in all 67 counties by the following fall. All of this activity led many in the state to believe they were "ahead of the curve," as Secretary of State C. Michael Weaver said before a legislative panel in October 2002. But the system proceeded to fall apart.

The system was slow and ineffective, with glitches that undermined its performance.⁴⁴ The key problem with the system has been the integration of large urban areas into the statewide database. Philadelphia generates enough registration traffic that it freezes up the system, making it inefficient both there and for all other counties at the same time. On January 26, 2005, following the system's abysmal performance in the 2004 election, 33 eastern Pennsylvania county election offices petitioned the state to end the contract with Accenture, hoping that a different company could correct the problems generated by SURE.⁴⁵ The program was faulty enough that 11 counties had already been granted a reprieve from using it until the errors in the system were corrected. These concerns were raised again on February 1, 2005, when county officials publicly objected

⁴⁴ <http://www.votersunite.org/article.asp?id=2657>

⁴⁵ Pamela Lehman. "Counties want state to scrap voter registry; Lehigh, Northampton among those protesting SURE as slow and difficult." The Morning Call, Inc. Morning Call (Allentown, Pennsylvania) January 26, 2005.

to the system at Gov. Ed Rendell's Election Reform Task Force meeting, calling for a new company to complete the system before January 1, 2006.

Rhode Island

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
2147	984	46.00	0.23

The Provisional Vote/Total Vote in Rhode Island is slightly below the median nationwide as is the overall percent counted. The state counted votes cast outside the correct precinct but lacked a registration database. Counting outside the precinct makes the state's percent counted look lower comparatively, though it remains near the median for states without a database. The state was new to provisional balloting. Its elections website gave information about ID requirements and provisional voting, though it did not help with registration verification or precinct location.

Voters whose names were not on the rolls received provisional ballots. After the election, state officials checked the information on the provisional ballot with registration records in order to verify the voter's status. After this process ran its course, voters could check the state's website to discover if their provisional ballot was counted in the final tally. Slightly less than half of the time, the answer was yes.

While this may sound redundant, Rhode Island exhibits all of the hallmarks of New England, excepting the Election Day Registration states of Maine and New Hampshire. Election administration is centralized at the state level. Counties are cut out of the process, while towns and cities administer the nuts and bolts of Election Day itself.

South Carolina

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
4930	3207	65.00	0.20

The state had a voter registration database, and it disqualified provisional ballots cast in an incorrect precinct. The state was not new to provisional balloting, instead building on a previous system. The state's election website allowed voters to verify their registration status, get information about provisional ballots, and know the state's ID requirements (strict photo ID, often described as the strictest in the nation.)⁴⁶ The website did not help voters locate their precinct, a problem in a state that disqualified provisional ballots for being cast in an improper location.

Provisional voters in the state were chiefly peoples whose names were not on registration rolls. After casting a ballot, officials verified the voter's registration status using the state's database. Then a voter was able to check the state's website to see if his or her vote counted in the election. In South Carolina, these voters would have seen their votes collectively counted at almost exactly the rate of the national average.

⁴⁶ For example, see <http://www.jsonline.com/news/state/apr05/322607.asp>. Recent legal changes in Indiana and Georgia have increased the number of states with similar photo ID laws.

South Dakota

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
533	66	12.00	Vote 0.02

South Dakota was new to provisional balloting, but it did have a voter registration database. It did not count ballots cast outside the correct precinct, and among such states it had the third lowest percent counted. The state's elections website helped voters find their precinct and gave information about provisional voting, though it did not discuss the state's photo ID requirement.

Most provisional ballots went to voters whose names were not on local registration rolls. The existence of a database probably contributed to why these voters ended up having votes that did not count, as they were most likely not registered in the first place. Provisional voters filled out an affidavit, which was verified against the state's database. Voters were sent letters explaining whether their provisional ballot had counted or not. Most of these letters indicated that the vote did not count.

South Dakota's voter ID laws generated some controversy, with lawmakers arguing that they kept Native Americans from voting.⁴⁷ These complaints were turned into bills, some to repeal the requirement entirely and others to exempt those living on the state's large reservations. These bills did not pass before the 2004 election.

⁴⁷ Lawmakers asked to repeal voter identification law, The Associated Press State & Local Wire, July 15, 2004, Thursday, BC cycle, State and Regional, 862 words, By CHET BROKAW, Associated Press Writer, PIERRE, S.D.

Tennessee

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
8778	3298	38.00	0.14

The state lacked a registration database and did not count ballots cast outside the correct precinct. It was new to provisional balloting, having no such system prior to the implementation of HAVA. The state's elections website provided little information to voters, not informing them of the possibilities of provisional voting, the state's ID requirements, the location of precincts, nor the voter's registration status.

Provisional ballots were widely distributed, going to those in the hospital, first-time voters without ID, those not on registration rolls, and others. These voters filled out an affidavit as to their identity and registration status, and these affidavits were verified with registration records to determine their veracity. After the verification process concluded, Tennessee voters received a letter informing them of whether or not their vote had been counted.

Texas

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
36193	7770	21.00	0.10

Texas modified a previous affidavit balloting system to comply with HAVA's requirements of a more complete provisional voting system. The new system, however, still used affidavits. The state did not have a registration database, nor did it count provisional ballots cast outside the correct precinct. The disqualification of ballots cast in the wrong precinct was a critical factor in lowering the percent counted in the state. Its elections website disseminated information about ID requirements and provisional voting, but the lack of database made it impossible to verify registration or precinct location.

Provisional ballots went to voters who were not on registration rolls or voted for the first time but lacked ID. These voters filled out an affidavit as to their identity and registration status, which was later cross-checked by officials with registration records. After this process played out, voters were notified by mail if their vote had counted or not.

Texas has several large urban areas: seven among the fifty largest cities in the country are in the state. But only thirteen of the top fifty cities have registration databases, meaning we are uncertain of the impact of databases on large urban areas. We know that the Pennsylvania database failed in Philadelphia, the nation's fifth largest city, because of the large number of changes being made right up to Election Day. But adding a database to Texas will have an unknown effect on the electoral process. The state already has remarkably low numbers of provisional votes.

Utah

		Percent	Provisional
PB Cast	PB Counted	counted	Vote/Total
26389	18575	70.00	Vote 2.00

Both percentages reported above are greater than the national average. The state lacked a voter registration database, and it counted provisional votes cast outside the correct precinct. The combination of these two factors make it understandable why Utah's amount of provisional ballots and rate of counting was higher than would otherwise be expected, using averages to inform our expectations. Utah was new to provisional balloting, beginning the system only after the passage of HAVA. The state's elections website was well-prepared to disseminate information about the changes to the system, providing information on provisional voting, ID requirements, and the location of precincts.

People not on local registration rolls were eligible to receive provisional ballots. After casting provisional ballots, voters had to return later with necessary ID. This ID was used in the verification process, after which voters could call a phone number in order to find out if their vote had counted. The notification system will change before the next election, by which time Utah plans to convert to a website.

The presidential election in Utah was not close, and it generated little electoral controversy.

Vermont

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
101	37	37.00	0.01

The state lacked a statewide voter registration database, and it counted provisional ballots cast in an incorrect precinct. Vermont was new to provisional balloting in the 2004 election. Its elections website provided voters with information about the state's ID requirements and provisional voting, along with having a mechanism that enables voters to find their precinct on Election Day.

Voters whose names were not on local registration rolls could vote provisionally. Provisional voters in Vermont signed an affidavit attesting to their identity and registration status. These affidavits were compared with registration records to determine which votes to count and which to disqualify. Voters could then call a phone number to learn whether their provisional ballot made up part of the final vote tally.

Vermont falls into the New England system of top-down election administration, which removes variance from HAVA implementation. In Vermont, this system reduced the number of provisional voters dramatically, quite an achievement for a state without a database. But its percent counted was in the bottom quarter for such states, making Vermont an unusual example that combines few votes with few counted.

Virginia

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
4172	728	17.00	0.02

Virginia did not have a voter registration database, nor did it count provisional ballots cast in improper precincts. Its percent counted was next to last among states without a voting database and in the lowest quarter among those who disqualified provisional ballots cast in an improper precinct. Virginia in 2004 was not new to provisional balloting, already having a system prior to the passage of HAVA. The state's elections website disseminated information about provisional voting, ID requirements, and the location of precincts.

Virginia gave out provisional ballots to first-time voters without ID and those whose names were not on local registration rolls. These voters submitted an affidavit, later verified by elections officials. After the verification process, voters could call a phone number to see if their provisional ballot was counted.

Since the election, allegations of vote fraud surfaced in southwestern Virginia. Specifically, the former mayor of Gate City, population slightly over 2,000, has been indicted on 37 counts of vote fraud.⁴⁸ He is accused of using absentee ballots to perpetrate his fraud and get himself elected. In this case, ID requirements would be ineffective in preventing this form of fraud.

⁴⁸ Laurence Hammack. "State charges former mayor with vote fraud." The Roanoke Times. August 2, 2005.

Washington

	PB	Percent	Provisional
PB Cast	Counted	counted	Vote/Total
87393	69645	80.00	2.44

Washington lacked a registration database, and it counted provisional ballots cast outside the correct precinct. Though Washington was not new to provisional voting, the process generated a massive amount of controversy across the state, setting up multiple controversial recounts in the gubernatorial race.⁴⁹ The state's elections website explained ID requirements, though it did not discuss provisional voting.

Washington voters could easily obtain provisional ballots, for reasons varying from hospitalization to absence from local rolls. Official procedure called for verification by comparing the information on the provisional envelope with registration records. Notification was left up to counties. But as future lawsuits clarified, official verification procedure was not always followed.

King County, home of Seattle, had poll workers mistakenly run provisional ballots through voting machines as if they were regular ballots, skipping the verification stage.⁵⁰ The problem was so severe that the Election Commissioner for the county stated that we "may never know the number of illegal ballots." This problem, and other accusations of vote fraud, were appealed to numerous state courts by eventual loser Dino Rossi. While the judge allowed for a wide range of possible accusations,⁵¹ in the end there was no justiciable solution to electoral problems.⁵²

⁴⁹ Judge rules for Democrats, allows provisional ballot count, The Associated Press State & Local Wire, November 16, 2004, Tuesday, BC cycle, State and Regional, 550 words, SEATTLE

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⁵² *Borders v. King County*

West Virginia

PB Cast	PB Counted	Percent counted	Provisional Vote/Total Vote
13367	8378	63.00	1.11

West Virginia had a registration database, and it did not count provisional ballots cast outside the correct precinct. The state was continuing its previous provisional system from before the passage of HAVA. The state's elections website gave information about provisional balloting but little else.

West Virginia, like Washington, widely distributed provisional ballots. These were counted by comparison to official records to verify the information given by the voter. Voters could call a phone number to discover the status of their provisional ballot.

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Georgia Provisional Ballots

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11. LEGISLATURE '05: Lawsuits likely over vote ID bill, The Atlanta Journal-Constitution, March 16, 2005 Wednesday, Home Edition, Pg. 1B, 538 words, NANCY BADERTSCHER, CARLOS CAMPOS

23. One-third of provisional votes counted, The Atlanta Journal-Constitution, November 13, 2004 Saturday, Home Edition, Pg. 4B, 551 words, CARLOS CAMPOS

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56. STEALING THE ELECTION?, The Augusta Chronicle (Georgia), October 24, 2004 Sunday, ALL EDITION, EDITORIAL; Pg. A04, 392 words

62. FAIL-SAFE VOTING SYSTEM BEGINS, The Augusta Chronicle (Georgia), October 20, 2004 Wednesday, ALL EDITION, NEWS; Pg. A11, 540 words, By Kate Lewis Staff Writer

Hawaii:

Hawaii Provisional Ballots

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Honolulu County Election Incidents

<https://voteprotect.org/index.php?display=EIRMapCounty&state=Hawaii&county=Honolulu&cat=ALL&tab=ALL>

Idaho:

Idaho Provisional Ballots and Voter ID

Idaho does not have provisional ballots.

No coverage of local issues, but a lot of focus on problems in Washington. Also, some attention to bills to stiffen ID requirements in Georgia, Texas, South Dakota, Wisconsin, Mississippi, and New Mexico.

Illinois:

Illinois Provisional Ballots

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29. Faulty registrations get provisional votes tossed, Chicago Sun-Times, November 29, 2004 Monday, NEWS; Pg. 21, 366 words, STEVE PATTERSON
37. Thousands of provisional ballots didn't count in Illinois, The Associated Press State & Local Wire, November 17, 2004, Wednesday, BC cycle, State and Regional, 772 words, By MAURA KELLY LANNAN, Associated Press Writer, CHICAGO
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50. Despite smooth voting Tuesday, experts press for more reforms, Copley News Service, November 5, 2004 Friday, WASHINGTON WIRE, 941 words, Toby Eckert Copley News Service, WASHINGTON
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85. Questions and answers about provisional voting, The Associated Press State & Local Wire, October 31, 2004, Sunday, BC cycle, Political News, 458 words, By MAURA KELLY LANNAN, Associated Press Writer, CHICAGO
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